

RFS Small Refinery Exemptions
Options for Handling Petitions Received After the Compliance Deadline

Briefing for Chris Grundler
28 June 2017

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Background –2016 Petitions Received After the Compliance Deadline

- **Ex. 4 CBI** has requested exemptions from the 2016 RFS for its **Ex. 4 CBI** refineries
 - Submitted petitions dated May 15 and May 16, 2017, respectively
- Other refineries may also be considering submitting 2016 petitions
 - We understand that **Ex. 4 CBI** will submit a petition for its **Ex. 4 CBI** refinery
- The 2016 RFS compliance deadline was March 31, 2017
- EPA has not previously received small refinery petitions submitted after the applicable RFS compliance deadline

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Will EPA Consider Small Refinery Petitions Submitted After the RFS Compliance Deadline?

- EPA must decide whether or not it will evaluate these newly submitted 2016 petitions.
- Statutory language leaves room for EPA interpretation
 - CAA section 211(o)(9)(B)(i): “A small refinery may at any time petition the Administrator for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship.” (emphasis added)
- Lack of precedent allows EPA to make a policy choice
 - Option 1: do not consider petitions submitted after the deadline
 - Option 2: review petitions regardless of whether they are submitted before or after the deadline

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Option 1: Only Evaluate Petitions Received Before the Compliance Deadline

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- Implementation of small refinery exemption program remains consistent with overall RFS program structure
 - Statute and EPA regulations impose obligations on an annual basis
 - Regulations impose deadline for obligated parties to comply with annual obligation
 - Preserves integrity of annual program and gives meaning to the compliance deadline
- Provides regulatory stability for industry by remaining consistent with existing approach
 - Preserves integrity of prior small refinery exemption decisions
 - Preserves integrity of RIN market for prior compliance years

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Option 2: Evaluate Petitions Received 'At Any Time'

- Alternate approach:
 - Choose to review small refinery petitions regardless of whether they are submitted before or after the applicable RFS compliance deadline
- If we select Option 2, we need to make some additional policy decisions as discussed on the following slides.
 - How will the Agency handle expired RINs?
 - Will the Agency set a unique deadline for hardship petitions or will EPA accept petition requests for past years (i.e., 2011-2015)?
- This approach would also raise significant near- and long-term issues for the RFS program.

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Issue 2a: How will the Agency handle expired RINs?

- A small refinery that has initially complied with the program and then subsequently receives relief is likely to have expired 2015 RINs that were part of its original 2016 compliance demonstration.

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Issue 2b: Will the Agency Accept Petitions for 2011-2015?

- If we take the view that “at any time” applies beyond the compliance deadline we will need to decide if that applies to years prior to 2016 as well.

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Option 2: Potential Impacts on Carryover RIN Volumes

- 26 additional small refineries would be eligible to petition and seek decision
- Potential impact on RIN market and parties that own RINs:
 - To date we have exempted 11 small refineries with an RVO of ~390 million RINs (~2% of the 2016 total renewable fuel standard)
 - The total RVO of all 38 potentially eligible small refineries is ~1.8 billion RINs (~8% of the 2016 total renewable fuel standard)
 - Every additional exemption that we grant adds that refinery's RVO to the carryover RIN bank
 - This will likely decrease the value of each RIN, harm parties that own RINs, and cause market uncertainty
- If we were to allow new petitions for 2011-2015 the issue of additional carryover RINs would be further exacerbated.

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Next Steps

- Decide on policy approach; develop and implement communication plan accordingly
 - Statute directs EPA to issue decision within 90 days of receiving petition (by August 14 for **Ex. 4 CBI** petitions)

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Ex. 4 CBI

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Appendix

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Ex. 4 CBI

Ex. 4 CBI

Message

From: Cohen, Janet [cohen.janet@epa.gov]
Sent: 7/29/2019 5:20:35 PM
To: Bunker, Byron [bunker.byron@epa.gov]
Subject: FW: nnto - reminder, please review & comment - draft sre briefing for anne
Attachments: 7_29_19 RFS DRAFT Small Refinery Hardship Briefing for Anne Idsal_update.pptx

Here's a standalone version. – j. -

From: Cohen, Janet
Sent: Monday, July 29, 2019 1:03 PM
To: Machiele, Paul <machiele.paul@epa.gov>
Subject: RE: nnto - reminder, please review & comment - draft sre briefing for anne

Paul, please see reworked slide 4 + slide 32,

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

From: Machiele, Paul <machiele.paul@epa.gov>
Sent: Monday, July 29, 2019 9:56 AM
To: Cohen, Janet <cohen.janet@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>; Garfinkle, Stacey <garfinkle.stacey@epa.gov>; Le, Madison <Le.Madison@epa.gov>; McKenna, Chris <McKenna.Chris@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Piotrowski, Greg <piotrowski.greg@epa.gov>; Spencer, Mark <spencer.mark@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Weihrauch, John <Weihrauch.John@epa.gov>
Subject: RE: nnto - reminder, please review & comment - draft sre briefing for anne

Your call, but I would suggest that you add another slide after slide 5, or some bullets to Slide 4:

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

From: Cohen, Janet
Sent: Monday, July 29, 2019 8:37 AM
To: Bunker, Byron <bunker.byron@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>; Garfinkle, Stacey <garfinkle.stacey@epa.gov>; Le, Madison <Le.Madison@epa.gov>; Machiele, Paul <machiele.paul@epa.gov>; McKenna, Chris <McKenna.Chris@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Piotrowski, Greg <piotrowski.greg@epa.gov>; Spencer, Mark <spencer.mark@epa.gov>; Stahle, Susan

<Stahle.Susan@epa.gov>; Weihrauch, John <Weihrauch.John@epa.gov>

Subject: nnto - reminder, please review & comment - draft sre briefing for anne

From: Cohen, Janet

Sent: Thursday, July 25, 2019 11:34 AM

To: Byron Bunker <Bunker.Byron@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>; Garfinkle, Stacey <Garfinkle.stacey@epa.gov>; Le, Madison <Le.Madison@epa.gov>; Machiele, Paul <machiele.paul@epa.gov>; McKenna, Chris <mckenna.chris@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Piotrowski, Greg <piotrowski.greg@epa.gov>; Spencer, Mark <spencer.mark@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Weihrauch, John <Weihrauch.John@epa.gov>

Subject: draft sre briefing for anne -- needs review and some updates

All, attached here and posted on sharepoint is a draft based on the last version of our briefing for Administrator Wheeler. It's rearranged and updated some but still needs your overall review as well as some specific updates:

Ex. 5 Deliberative Process (DP)

RFS Small Refinery Exemptions
Late 2016 Petitions
Options for 2017 Evaluation and Decision Process
Discussion with Mandy Gunasekara
October 5, 2017

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Overview

- ▶ Purpose of today's discussion:
 - ▶ Update/wrap-up on late 2016 petitions
 - ▶ Options for 2017 petitions

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Late 2016 Petitions

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Status of Late 2016 Petitions

Ex. 4 CBI

- ▶ Island Energy Systems: **Ex. 4 CBI**
 - ▶ DOE has the submissions and is evaluating these petitions
 - ▶ We do not yet know what DOE will recommend
- ▶ We expect to receive more 2016 petitions as refineries learn that they may still petition

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Options for Treatment of 2017 Small Refinery RFS Hardship Petitions

Slides for Use in Potential Briefing with EPA Political Leadership

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Background on 2017

- ▶ We have received five petitions to date from small refineries seeking exemption from the 2017 RFS. We would like to confirm policy direction before we begin our evaluation so we can apply a consistent approach to all 2017 petitions

- ▶ The 2017 situation is different than past years:
 - ▶ For the first time EPA has its own direction from Congress on its treatment of small refinery petitions
 - Previous Congressional statements were directed only to DOE
 - An explanatory statement to the 2017 budget bill directs EPA to follow DOE's recommendation, or report to the appropriations committee and the DOE secretary at least 10 days in advance of issuing a decision that differs from DOE's recommendation
 - ▶ In past years, EPA followed the statutory directive to consult with DOE, consider the (DOE) Small Refinery study, and "other economic factors" in deciding whether to grant relief or not

- ▶ We expect to receive many more 2017 petitions than we did in recent years as a result of the Congressional explanatory statement and of our granting of almost all petitions in 2016

Small Refinery Exemption Eligibility and Decisions

	2007- 2010	2011- 2012	2013	2014	2015	2016	2017
Eligible ^f	59	-	-	-	-	38	38
Grant	59 ^a	24	8	6	4	11	tbd
Deny	n/a	8	7	6	9	1	tbd
Other	n/a	0	1 ^c	0	1 ^d	4 ^e	tbd
Total Petitions	n/a	32 ^b	16	12	14	16	tbd

^a Statute exempted all small refineries through 2010

^b Includes refineries that participated through DOE survey and through petition to EPA

^c Petition withdrawn

^d Petition deemed ineligible

^e Petitions received after compliance deadline

^f The number of small refineries eligible to petition has decreased since the RFS program was created because of consolidation, acquisition, cessation of transportation fuel production, etc.

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Appendix

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2016 Small Refinery Petitions Granted

Petitioner	Location	EPA Decision	Exempted RVO	Exemption Value
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Ex. 4 CBI

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Late 2016 Small Refinery Petitions

Petitioner	Location	Likely EPA Decision	Exempted RVO	Exemption Value
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Ex. 4 CBI

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Small Refineries Eligible to Petition for 2017 RFS Exemption

Refinery	City	State	Est. 2017 RVO	Refinery	City	State	Est. 2017 RVO
Ex. 4 CBI							

* 2016 Exemption granted * 2016 Exemption denied * Late 2016 Petition received * 2017 Petition Received

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Small Refinery Language from Appropriations Committee Report

Small Refinery Relief.—Congress directed the Agency, in consultation with the Department of Energy [DOE], to grant hardship relief to small refineries if compliance with the Renewable Fuel Standard [RFS] would impose a disproportionate economic hardship. In response to several recent petitions, the Agency determined that compliance with the RFS would have a disproportionate economic impact on a small refinery, but denied hardship relief because the small refinery remained profitable notwithstanding the disproportionate economic impact. This is inconsistent with congressional intent because the statute does not contemplate that a small refinery would only be able to obtain an exemption by showing that the RFS program threatens its viability. Congress explicitly authorized the Agency to grant small refinery hardship relief to ensure that small refineries remain both competitive and profitable. In the intensely competitive transportation fuels market, small entities cannot remain competitive and profitable if they face disproportionate structural or economic metrics such as limitations on access to capital, lack of other business lines, disproportionate production of diesel fuel, or other site specific factors identified in DOE's original 2011 Small Refinery Exemption Study prepared for Congress. When making decisions about small refinery exemptions under the RFS program, the Agency is directed to follow DOE's recommendations which are to be based on the original 2011 Small Refinery Exemption Study prepared for Congress and the conference report to division D of the Consolidated Appropriations Act of 2016. Should the Administrator disagree with a waiver recommendation from the Secretary of Energy, either to approve or deny, the Agency shall provide a report to the Committee on Appropriations and to the Secretary of Energy that explains the Agency position. Such report shall be provided 10 days prior to issuing a decision on a waiver petition.

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Message

From: Cohen, Janet [cohen.janet@epa.gov]
Sent: 11/29/2017 5:42:09 PM
To: Bunker, Byron [bunker.byron@epa.gov]
Subject: FW: small refinery briefing for 10 am fuels meeting
Attachments: 11_29_17 draft Wehrum small refinery discussion.pptx; 11_27_17 RFS Small Refinery Grants and Denials_2013-2016.docx; 11_27_17 RFS Small Refinery Grants and Denials_2016 only.docx

fyi

From: Cohen, Janet
Sent: Wednesday, November 29, 2017 12:35 PM
To: OTAQ Materials <OTAQMaterials@epa.gov>
Subject: RE: small refinery briefing for 10 am fuels meeting

Here is an updated version plus the league tables, all in one place. – j. -

From: Hengst, Benjamin
Sent: Wednesday, November 29, 2017 11:44 AM
To: Cohen, Janet <cohen.janet@epa.gov>
Cc: Sutton, Tia <sutton.tia@epa.gov>; Burch, Julia <Burch.Julia@epa.gov>
Subject: RE: small refinery briefing for 10 am fuels meeting

Janet—when you have a final version, can you please re-circulate to OTAQ Materials? Chris said he'll look at it 1pm today, so he may have edits after that.

From: Cohen, Janet
Sent: Wednesday, November 29, 2017 9:43 AM
To: OTAQ Materials <OTAQMaterials@epa.gov>
Cc: Davis, Theresa <Davis.Theresa@epa.gov>; Schmittou, Kim <schmittou.kim@epa.gov>; Boylan, Thomas <boylan.thomas@epa.gov>; Li, Ryland (Shengzhi) <Li.Ryland@epa.gov>; Machiele, Paul <machiele.paul@epa.gov>; Master, Barbora <Master.Barbora@epa.gov>; McKenna, Chris <McKenna.Chris@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Piotrowski, Greg <piotrowski.greg@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Sutton, Tia <sutton.tia@epa.gov>; Tom White <Thomas.White@hq.doe.gov>; Weihrauch, John <Weihrauch.John@epa.gov>
Subject: small refinery briefing for 10 am fuels meeting

Ben et al,
 Can you please print this out for Chris.

Kim/Theresa, can you please print 6 copies for me.

Thanks! – j. -

Message

From: Cohen, Janet [cohen.janet@epa.gov]
Sent: 10/4/2017 3:01:31 PM
To: Bunker, Byron [bunker.byron@epa.gov]
Subject: revised briefing
Attachments: 10_5_17 small refinery discussion.pptx

Byron – here’s an updated version for your review. Changes from last version are:

- Title page
- Organization – 2016 first, then 2017; some 2016 slides in previous version moved to appendix here
- Slide 4 – new sub-bullet on need to report to Congress, revised language on expectation for more 2016 petitions
- Slide 8 – added “in full or in part” to last sub bullet on slide
- Slide 11 – added footnote noting Ex. 4 CBI

- J. -

Message

From: Cohen, Janet [cohen.janet@epa.gov]
Sent: 11/28/2017 6:35:47 PM
To: Bunker, Byron [bunker.byron@epa.gov]
Subject: draft wehrum small refinery briefing
Attachments: 11_27_17 draft Wehrum small refinery discussion.pptx

Byron,

Sending you current draft in interest of time but team is still commenting on this – I asked for them to look at organization, whether content could be condensed and or moved from Appendix to body and vice versa, etc. We are probably going to create an overview chronology type slide, maybe that can substitute for some of the material currently in the body and the detailed slides can move to the appendix. Also asked OGC specifically to look at new content I added on Court challenges. And Tia wants to add a slide about the difference between small refiners and small refineries, which I think should go in the appendix.

Ex. 5 Deliberative Process (DP)

- J. -

Message

From: Cohen, Janet [cohen.janet@epa.gov]
Sent: 6/27/2017 7:25:26 PM
To: Bunker, Byron [bunker.byron@epa.gov]
Subject: start on new briefing concept?
Attachments: 6_27_17 draft past deadline briefing OGC + paul +lauren new.pptx

Byron – I started playing with what I now understand you to want. Please check out slides 5-10 – maybe this is more what you were looking for?

Message

From: Cohen, Janet [cohen.janet@epa.gov]
Sent: 6/27/2017 3:56:09 PM
To: Bunker, Byron [bunker.byron@epa.gov]
Subject: FW: new draft of rfs briefing on share drive
Attachments: 6_20_17 draft past deadline briefing OGC cRSL (002) + paul.pptx

Byron – here's the version with Ryland's comments + Paul M.s and I added in the IES petition info we have.

From: Li, Ryland (Shengzhi)
Sent: Tuesday, June 27, 2017 10:04 AM
To: Cohen, Janet <cohen.janet@epa.gov>
Cc: Orlin, David <Orlin.David@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>
Subject: RE: new draft of rfs briefing on share drive

Janet,

Attached are my comments on the version you circulated (I commented before you circulated the one with Paul's edits). I hope these are useful to you and the team.

Also FYI, Dave and Sue are both out this week. Dave is on vacation and coming back next Thursday, and Sue is on medical leave this week (but can be reached if necessary).

Regards,

Ryland

Ryland (Shengzhi) Li
 Attorney-Adviser
 U.S. Environmental Protection Agency
 Office of General Counsel, Air and Radiation Law Office
 tel: (202) 564-6787 | em: li.ryland@epa.gov | desk: WJC-N 7353K
 mail: USEPA (2344A), 1200 Pennsylvania Ave. NW, Washington, DC 20460

From: Cohen, Janet
Sent: Monday, June 26, 2017 3:58 PM
To: Bunker, Byron <bunker.byron@epa.gov>; Li, Ryland (Shengzhi) <Li.Ryland@epa.gov>; Machiele, Paul <machiele.paul@epa.gov>; Master, Barbora <Master.Barbora@epa.gov>; McKenna, Chris <McKenna.Chris@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Piotrowski, Greg <piotrowski.greg@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Sutton, Tia <sutton.tia@epa.gov>; thomas.white@hq.doe.gov; Weihrauch, John <Weihrauch.John@epa.gov>
Subject: new draft of rfs briefing on share drive

All – I updated the version I sent out Friday to include comments from Paul M. (shown in red/strikeout) and on notes pages. I've posted this version on sharepoint site and am including here for convenience. –j. -

Message

From: Cohen, Janet [cohen.janet@epa.gov]
Sent: 9/20/2017 5:32:45 PM
To: Bunker, Byron [bunker.byron@epa.gov]
Subject: cleaner version of 2017 small refinery briefing
Attachments: 9_20_17 clean draft 2017 options briefing.pptx

Byron, this version includes a few team edits and is cleaned up except for one slide with comments from Paul M. that I haven't looked at yet. -j. -

Message

From: Cohen, Janet [cohen.janet@epa.gov]
Sent: 4/17/2018 7:08:15 PM
To: Bunker, Byron [bunker.byron@epa.gov]
Subject: draft outline of wehrum briefing
Attachments: 4_17_18 draft bw small refinery update.docx

Importance: High

Byron – here's a start. Does this capture the structure you are suggesting? - j. -

DRAFT 4.17.18

Outline of Small Refinery Update for Bill Wehrum April 20, 2018

1. Snapshot of where we are now with petitions

2016 and 2017

Compliance Year	Petitions Pending	Petitions Received	Decisions Issued			Total Exemptions	
			Grant	Deny	Total	Volume (mil gals)	RINs (mil)
2016	0	20	19	1	20	7,837.2	791.6
2017	4	29	25		25	11,118.9	1,189.6
TOTAL	4	49	44	1	85	18,956.1	1,981.2

Remaining 2017 petitions:

- Ready for signature (XXX decision, XXX refineries)
- **Ex. 4 CBI / Ex. 5 Deliberative Process (DP)**

Other:

- Have received petitions from **Ex. 4 CBI** for 2013 – 2015 for its **Ex. 4 CBI** refineries (see next topic)
- No 2018 petitions yet but expect those to start arriving any time
- More 2017 petitions possible

2. Asks/Decisions for Today

Can/should/will EPA 'reimburse' small refineries that get exemptions after returned/held RINs have expired by creating new, current-vintage RINs?

- **Ex. 4 CBI / Ex. 5 Deliberative Process (DP)**
- Answer will inform decision on next item (see below)

Can/should/will EPA evaluate new petitions for prior year obligations (when RINs have already expired) and petitions for reconsideration of prior decisions?

- *NOTE : This is a different circumstance than was the case in decision to evaluate new 2016 petitions after the 2016 compliance deadline had passed, but the 2016 RINs had not yet expired and thus still could be sold or used for 2017 compliance*

Ex. 4 CBI / Ex. 5 Deliberative Process (DP)

3. Communication about EPA Small Refinery Decisions and Policy

- EPA has not yet made a public statement about its current approach to small refinery exemption policy and decisions. As a result, there are numerous inquiries to which we have not yet responded (see appendix). These include:
 - o Has EPA changed its approach overall? (Many parties)
 - o How does EPA interpret “extension of exemption”? Who is eligible? (Growth Energy)
 - o Has EPA’s assessment of eligibility changed? (Perkins Coie)
 - o When may/must refineries petition? Too late for a prior year like 2010 – 2017? How would refinery be reimbursed if petition is granted? (Turner Mason & Co)
 - o How many petitions/grants/denials? Which refineries? Etc. (Many parties)
- Proposed website updates on exempted volumes and RINs

4. Appendix

Potential appendix slides

- List of current FOIAs, Congressionals, etc
- Background on **Ex. 4 CBI**
- Summary table of small refinery exemptions 2011 – 2017
- Other?

Message

From: Cohen, Janet [cohen.janet@epa.gov]
Sent: 4/17/2018 6:18:02 PM
To: Bunker, Byron [bunker.byron@epa.gov]
Subject: FW: revised briefing
Attachments: 10_5_17 small refinery discussion.pptx

From: Cohen, Janet
Sent: Wednesday, October 04, 2017 1:08 PM
To: Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Cc: Byron Bunker <Bunker.Byron@epa.gov>
Subject: FW: revised briefing

Byron says he's ok with these. – j. -

From: Cohen, Janet
Sent: Wednesday, October 04, 2017 11:23 AM
To: Byron Bunker <Bunker.Byron@epa.gov>
Subject: FW: revised briefing

One more update, changed language on slide 4 from, Ex. 5 Deliberative Process (DP)
Ex. 5 Deliberative Process (DP)

- J. -

From: Cohen, Janet
Sent: Wednesday, October 04, 2017 11:01 AM
To: Byron Bunker <Bunker.Byron@epa.gov>
Subject: revised briefing

Byron – here's an updated version for your review. Changes from last version are:

- Title page
- Organization – 2016 first, then 2017; some 2016 slides in previous version moved to appendix here
- Slide 4 – new sub-bullet on need to report to Congress, revised language on expectation for more 2016 petitions
- Slide 8 – added “in full or in part” to last sub bullet on slide
- Slide 11 – added footnote noting challenge to Ex. 4 CBI

- J. -

Message

From: Cohen, Janet [cohen.janet@epa.gov]
Sent: 4/17/2018 6:11:57 PM
To: Bunker, Byron [bunker.byron@epa.gov]
Subject: FW: Draft note on Small Refinery Hardships
Attachments: Ex. 4 CBI Support Document 20170711.docx

From: Bunker, Byron
Sent: Thursday, July 20, 2017 3:52 PM
To: Grundler, Christopher <grundler.christopher@epa.gov>
Cc: Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Li, Ryland (Shengzhi) <Li.Ryland@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>
Subject: Draft note on Small Refinery Hardships

Hi Chris,

Copied below is a draft note for Mandy. I have also attached the draft decision document with the team's comments removed. Please let me know if you need anything else.

Thanks,

Byron

***** draft note *****

Mandy,

Ex. 5 Deliberative Process (DP)

Byron Bunker
Director Compliance Division
Office of Transportation and Air Quality
Environmental Protection Agency
2000 Traverwood Drive
Ann Arbor, MI 48105
Bunker.Byron@epa.gov
Phone: (734) 214-4155

Ex. 6 Personal Privacy (PP)

Message

From: Cohen, Janet [cohen.janet@epa.gov]
Sent: 4/17/2018 6:06:47 PM
To: Bunker, Byron [bunker.byron@epa.gov]
Subject: FW: small refinery hardship one-pagers
Attachments: 3_22_17 Byron RFS Small Refinery Hardship - Options for New Approval Criteria 3-17.docx

From: Cohen, Janet
Sent: Friday, March 31, 2017 3:38 PM
To: Sutton, Tia <sutton.tia@epa.gov>
Cc: Byron Bunker <Bunker.Byron@epa.gov>
Subject: RE: small refinery hardship one-pagers

Tia, this is the most recent copy I have, but honestly things were moving fast and I wasn't in on all the correspondence so it's possible that a different and/or more recent version got sent to the Administrator's team. Copying Byron who may know.

Ex. 5 Deliberative Process (DP)

- J. -

From: Sutton, Tia
Sent: Friday, March 31, 2017 12:49 PM
To: Cohen, Janet <cohen.janet@epa.gov>
Subject: RE: small refinery hardship one-pagers

Hey Janet,
Chris is on the road back to Ann Arbor now, but may still want them, so that would be great if you could send when you get a chance.

Ex. 5 Deliberative Process (DP)

Thanks!
-Tia

From: Cohen, Janet
Sent: Friday, March 31, 2017 11:18 AM
To: Sutton, Tia <sutton.tia@epa.gov>
Subject: RE: small refinery hardship one-pagers

Sorry Tia, was in a meeting and am just seeing this now, too late. Is it now moot, did you find them, or do you still need me to send? -j. -

From: Sutton, Tia
Sent: Friday, March 31, 2017 9:24 AM
To: Cohen, Janet <cohen.janet@epa.gov>

Subject: small refinery hardship one-pagers

Importance: High

Hey Janet,

Do you have the most recent copies of the small refinery one-pgrs that were sent to the Administrator/Mandy/Ryan J handy? I'm trying to pull together a briefing book for Chris by 10am, and I just realized that I don't think we have any of the small refinery hardship one-pagers saved here on our DC sharedrive (at least, not that I can find). If you could send any that you have on over, that would be great.

Thanks much!

-Tia

Message

From: Cohen, Janet [cohen.janet@epa.gov]
Sent: 4/5/2018 8:32:55 PM
To: Bunker, Byron [bunker.byron@epa.gov]
Subject: FW: update on status/ plans for 2017 and 2016 small refinery petitions
Attachments: 1_3_18 Small Refinery RFS Exemption Petition Status.DOCX

Byron,

Ex. 5 Deliberative Process (DP)

From: Cohen, Janet
Sent: Wednesday, January 03, 2018 6:42 PM
To: Byron Bunker <Bunker.Byron@epa.gov>
Cc: Boylan, Thomas <Boylan.Thomas@epa.gov>; Li, Ryland (Shengzhi) <Li.Ryland@epa.gov>; Machiele, Paul <machiele.paul@epa.gov>; Master, Barbora <Master.Barbora@epa.gov>; McKenna, Chris <mckenna.chris@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Piotrowski, Greg <piotrowski.greg@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Sutton, Tia <sutton.tia@epa.gov>; thomas.white@hq.doe.gov; Weihrauch, John <Weihrauch.John@epa.gov>
Subject: update on status/ plans for 2017 and 2016 small refinery petitions

Byron,

Here is a status update on small refinery RFS exemption petitions, plus a check-in on next steps

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

- J. -

Chris,

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

2017 Small Refinery RFS Exemption Petitions

Petitioner	Date	Comments
Alon Krotz Springs (St. Landry Parish, LA)	12.13.17	
Ex. 4 CBI	07.11.17	
	12.20.17	Ex. 4 CBI
	12.20.17	
	12.20.17	
	12.20.17	
	12.27.17	
Calumet Montana (Great Falls, MT)	12.21.17	
Calumet San Antonio (San Antonio, TX)	10.20.17	
Calumet Shreveport (Shreveport, AL)	09.29.17	
Calumet Superior (Superior, WI)	08.09.17	
Ex. 4 CBI	12.29.17	
	10.27.17	
	12.13.17	
	12.14.17	
	07.28.17	
Island Energy Services (Kapolei, HI)	12.20.17	
Lion Oil (El Dorado, AR)	10.24.17	
Par Hawaii (Kapolei, HI)	12.29.17	Ex. 4 CBI
Ex. 4 CBI	12.21.17	

Ex. 4 CBI	12.21.17	
	12.20.17	
	07.12.17	
WRC (Newcastle, WY)	12.29.17	

Late 2016 Petitions

Petitioner	Date	Comments
Ex. 4 CBI	12.20.17	Ex. 4 CBI
	12.20.17	
	12.20.17	
	12.20.17	
	09.13.17	Grant decision issued 12.20.17
Island Energy Services (Kapolei, HI)	6.26.2017	Ex. 5 Deliberative Process (DP)
Ex. 4 CBI	5.16.17	Grant decision issued 11.1.17
	5.15.17	Grant decision issued 11.1.17

Message

From: Cohen, Janet [cohen.janet@epa.gov]
Sent: 4/5/2018 1:29:12 PM
To: Bunker, Byron [bunker.byron@epa.gov]
Subject: FW: Materials for 10:30am & 1pm OTAQ briefings tomorrow
Attachments: 2_15_18 Refinery Eligibility.docx

Byron, I'll keep looking but so far this is the only email I have about talking with Bill Wehrum about eligibility in the February time frame. - . -

From: Bunker, Byron
Sent: Wednesday, February 14, 2018 5:51 PM
To: Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Manners, Mary <manners.mary@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>
Cc: Sutton, Tia <sutton.tia@epa.gov>; Burkholder, Dallas <burkholder.dallas@epa.gov>
Subject: RE: Materials for 10:30am & 1pm OTAQ briefings tomorrow

Hi Ben,

Attached is an updated draft that removes Chris's name from the title and updates the date. I think this is good to go.

Thanks,

Byron

Byron Bunker
 Director Compliance Division
 Office of Transportation and Air Quality
 Environmental Protection Agency
 2000 Traverwood Drive
 Ann Arbor, MI 48105
Bunker.Byron@epa.gov
 Phone: (734) 214-4155

Ex. 6 Personal Privacy (PP)

From: Hengst, Benjamin
Sent: Wednesday, February 14, 2018 5:40 PM
To: Bunker, Byron <bunker.byron@epa.gov>; Manners, Mary <manners.mary@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>
Cc: Sutton, Tia <sutton.tia@epa.gov>; Burkholder, Dallas <burkholder.dallas@epa.gov>
Subject: Fwd: Materials for 10:30am & 1pm OTAQ briefings tomorrow

Byron, Janet, Mary: will there be any changes to the paper on small refinery cut-offs? Or should we send down what you shared with Chris today?

Begin forwarded message:

From: "Sutton, Tia" <sutton.tia@epa.gov>

Date: February 14, 2018 at 4:57:18 PM EST

To: OAR Briefings <OAR_Briefings@epa.gov>

Cc: "Hengst, Benjamin" <Hengst.Benjamin@epa.gov>, "Burch, Julia" <Burch.Julia@epa.gov>, "Burkholder, Dallas" <burkholder.dallas@epa.gov>

Subject: Materials for 10:30am & 1pm OTAQ briefings tomorrow

Hi all,

Attached are materials for 2 briefings with Bill tomorrow:

- The Word document is for the 10:30 "OTAQ Fuels Weekly"
- The Powerpoint slides are for the 1pm "RFS/RIN Economics"

I know we're a little late in sending, so please let me know if you need me to print and run copies down to you (or if you would like for Chris to email them to Bill this evening).

Thanks!

-Tia

<AFPM 2017 Cellulosic Biofuel Waiver Request for Bill W.docx>

<RIN Economics Briefing for Bill W Final.pptx>

Message

From: Cohen, Janet [cohen.janet@epa.gov]
Sent: 3/7/2017 3:51:21 PM
To: Bunker, Byron [bunker.byron@epa.gov]; Manners, Mary [manners.mary@epa.gov]
Subject: FW: possible small refinery briefing materials
Attachments: Small refinery denials for 2016_with Ex. 4 CBI DOCX; 3_7_17 DRAFT small refinery briefing for Scott Pruitt.pptx; 3_7_17 draft 2016 RFS Hardship Decision Table Handouts for administor briefing.docx

Fyi – electronic copies of what we’ve pulled together so far. Will of course adjust as we get more info from Tia. – j. -

From: Cohen, Janet
Sent: Tuesday, March 07, 2017 9:46 AM
To: Li, Ryland (Shengzhi) <Li.Ryland@epa.gov>; Machiele, Paul <machiele.paul@epa.gov>; Master, Barbora <Master.Barbora@epa.gov>; McKenna, Chris <mckenna.chris@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Piotrowski, Greg <piotrowski.greg@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Sutton, Tia <sutton.tia@epa.gov>; thomas.white@hq.doe.gov; Weihrauch, John <Weihrauch.John@epa.gov>; Williams, Brent <Williams.Brent@epa.gov>
Subject: for discussion at club meeting

All – please see attached from Barbara plus my first fast cut at squishing about four briefings into one. – j. -

From: Master, Barbora
Sent: Tuesday, March 07, 2017 8:54 AM
To: Cohen, Janet <cohen.janet@epa.gov>; Williams, Brent <Williams.Brent@epa.gov>
Cc: Piotrowski, Greg <piotrowski.greg@epa.gov>
Subject: RE: please update with Ex. 4 CBI info

Here is the updated one-pager, I put one comment bubble on one area of uncertainty for me. Hoping to get some advice there. Thanks.

Barbora Master
 U.S. Environmental Protection Agency
 202-343-9899

From: Cohen, Janet
Sent: Tuesday, March 07, 2017 8:06 AM
To: Master, Barbora <Master.Barbora@epa.gov>; Williams, Brent <Williams.Brent@epa.gov>
Cc: Piotrowski, Greg <piotrowski.greg@epa.gov>
Subject: please update with Ex. 4 CBI info

Barbora & Brent –

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Many thanks. – j. -

Message

From: Cohen, Janet [cohen.janet@epa.gov]
Sent: 2/1/2019 6:40:10 PM
To: Bunker, Byron [bunker.byron@epa.gov]
Subject: sre briefings
Attachments: 3_16_17 DRAFT small refinery briefing for Administrator Pruitt_jc.pptx; 2_2_17 small refinery transition briefing for Sarah Dunham.pptx; 2_2_17 decision summary table for transition briefing.doc; 12_1_17 final Wehrum small refinery discussion.pptx

Byron,

Ex. 5 Deliberative Process (DP)	
Ex. 5 Deliberative Process (DP)	Ex. 6 Personal Privacy (PP)
Ex. 6 Personal Privacy (PP)	
Ex. 6 Personal Privacy (PP)	I can work on consolidating and updating over the weekend too.

I am attaching a few versions of things for you to look at:

- 1) The last version I have of the briefing we were preparing for Pruitt
- 2) The transition briefing for Sarah (with decision table)
- 3) The intro and 2017 decision briefing for Wehrum

We also have briefings we may want to pull material from that include more detail about the DOE and EPA congressional language, decisions about “at any time,” issues with replacement RINs, and the transition briefing OGC used for its own new political leaders.

- J. -

Message

From: Cohen, Janet [cohen.janet@epa.gov]
Sent: 9/11/2019 2:18:37 PM
To: Bunker, Byron [bunker.byron@epa.gov]
Subject: FW: for review and comment very draft framework for sre options paper
Attachments: 9_9_19 Discussion DRAFT SRE Options.docx

From: Cohen, Janet
Sent: Monday, September 09, 2019 8:49 AM
To: Burkholder, Dallas <burkholder.dallas@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Machiele, Paul <machiele.paul@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; McKenna, Chris <mckenna.chris@epa.gov>; Korotney, David <korotney.david@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Spencer, Mark <spencer.mark@epa.gov>; Burch, Julia <Burch.Julia@epa.gov>
Subject: RE: for review and comment very draft framework for sre options paper

All – A discussion draft is posted on Sharepoint [9_9_19 Discussion DRAFT SRE Options](#) and attached here. I'll print out copies for AA.

From: Burkholder, Dallas <burkholder.dallas@epa.gov>
Sent: Friday, September 06, 2019 3:46 PM
To: Cohen, Janet <cohen.janet@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Machiele, Paul <machiele.paul@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; McKenna, Chris <McKenna.Chris@epa.gov>; Korotney, David <korotney.david@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Spencer, Mark <spencer.mark@epa.gov>; Burch, Julia <Burch.Julia@epa.gov>
Subject: RE: for review and comment very draft framework for sre options paper

Ex. 5 Deliberative Process (DP)

From: Cohen, Janet <cohen.janet@epa.gov>
Sent: Friday, September 06, 2019 2:51 PM
To: Burkholder, Dallas <burkholder.dallas@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Machiele, Paul <machiele.paul@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; McKenna, Chris <McKenna.Chris@epa.gov>; Korotney, David <korotney.david@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Spencer, Mark <spencer.mark@epa.gov>; Burch, Julia <Burch.Julia@epa.gov>
Subject: RE: for review and comment very draft framework for sre options paper

Thanks Dallas

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

From: Burkholder, Dallas <burkholder.dallas@epa.gov>

Sent: Friday, September 06, 2019 2:33 PM

To: Cohen, Janet <cohen.janet@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Machiele, Paul <machiele.paul@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; McKenna, Chris <McKenna.Chris@epa.gov>; Korotney, David <korotney.david@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Spencer, Mark <spencer.mark@epa.gov>; Burch, Julia <Burch.Julia@epa.gov>

Subject: RE: for review and comment very draft framework for sre options paper

We currently have a briefing scheduled with Sarah D. at 9am on Monday next week to cover **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP)

Dallas

From: Cohen, Janet <cohen.janet@epa.gov>

Sent: Friday, September 06, 2019 1:10 PM

To: Nelson, Karen <nelson.karen@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Burkholder, Dallas <burkholder.dallas@epa.gov>; Machiele, Paul <machiele.paul@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; McKenna, Chris <McKenna.Chris@epa.gov>; Korotney, David <korotney.david@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Spencer, Mark <spencer.mark@epa.gov>

Subject: for review and comment very draft framework for sre options paper

All –

To get us started I put together an outline for the options paper we talked about yesterday. I haven't included any of the details yet – for now let's make sure we've covered all the main points and decide if we like this structure. This draft is also posted to the small refinery sharepoint folder, linked here: [9 6 19 DRAFT SRE Options](#)

Message

From: Cohen, Janet [cohen.janet@epa.gov]
Sent: 1/30/2019 12:35:47 PM
To: Bunker, Byron [bunker.byron@epa.gov]
Subject: FW: RFS Small Refinery B W Update Briefing
Attachments: DRAFT wehrum update sre decisions_1.29.19.pptx

Fyi. I'm about to go in and start editing the sharepoint version. – j. -

From: Nelson, Karen
Sent: Tuesday, January 29, 2019 11:45 PM
To: Cohen, Janet <cohen.janet@epa.gov>; Boylan, Thomas <Boylan.Thomas@epa.gov>; Garfinkle, Stacey <Garfinkle.stacey@epa.gov>; Machiele, Paul <machiele.paul@epa.gov>; McKenna, Chris <mckenna.chris@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Piotrowski, Greg <piotrowski.greg@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Weihrauch, John <Weihrauch.John@epa.gov>; Le, Madison <Le.Madison@epa.gov>
Subject: RFS Small Refinery B W Update Briefing

Hi Team,

Here are the slides Janet and I have started. I've also uploaded it to Share Point [here](#).

One thing I was confused on after the meeting this morning was how long this briefing is going to be?

Thanks!
-Karen

Message

From: Bunker, Byron [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=DDF7BCF023D241A9A477A2DC75D5901C-BUNKER, BYRON]
Sent: 5/9/2019 4:32:31 PM
To: Bunker, Byron [bunker.byron@epa.gov]
Subject: FW: ogc sre briefing
Attachments: 6_4_18 OGC small refinery discussion with General Counsel.pptx; RFS Small Refinery Hardship Briefing for Administrator Wheeler_2.6.19.pptx; 4_15_19 OAR-27 CLEAN RFS-Small Refinery Exemptions.docx

Byron Bunker
Director Compliance Division
Office of Transportation and Air Quality
Environmental Protection Agency
2000 Traverwood Drive
Ann Arbor, MI 48105
Bunker.Byron@epa.gov
Phone: (734) 214-4155

Ex. 6 Personal Privacy (PP)

From: Cohen, Janet
Sent: Thursday, April 11, 2019 10:39 AM
To: Bunker, Byron <bunker.byron@epa.gov>
Subject: ogc sre briefing

Byron, OGC's briefing for GC is attached. Discussion of past and pending cases starts with slide 14. This pre-dates the Ex. 4 CBI decision. Updated info about Ex. 4 CBI and current pending cases is included in the overview SRE briefing we prepared for the Administrator, also attached. (see slides 17 and 32)

Message

From: Bunker, Byron [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=DDF7BCF023D241A9A477A2DC75D5901C-BUNKER, BYRON]
Sent: 7/30/2019 3:27:48 PM
To: Burkholder, Dallas [burkholder.dallas@epa.gov]
Subject: FW: SRE briefing materials for 7/30
Attachments: RFS Small Refinery Hardship Briefing for Anne Idsal.pptx

Byron Bunker
Director Compliance Division
Office of Transportation and Air Quality
Environmental Protection Agency
2000 Traverwood Drive
Ann Arbor, MI 48105
Bunker.Byron@epa.gov
Phone: (734) 214-4155

Ex. 6 Personal Privacy (PP)

From: Cohen, Janet
Sent: Monday, July 29, 2019 3:28 PM
To: OTAQ Materials <OTAQMaterials@epa.gov>
Cc: Bunker, Byron <bunker.byron@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>; Garfinkle, Stacey <garfinkle.stacey@epa.gov>; Le, Madison <Le.Madison@epa.gov>; Machiele, Paul <machiele.paul@epa.gov>; McKenna, Chris <McKenna.Chris@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Piotrowski, Greg <piotrowski.greg@epa.gov>; Spencer, Mark <spencer.mark@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Weihrauch, John <Weihrauch.John@epa.gov>
Subject: SRE briefing materials for 7/30

Message

From: Bunker, Byron [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=DDF7BCF023D241A9A477A2DC75D5901C-BUNKER, BYRON]
Sent: 5/8/2020 5:13:39 PM
To: Charmley, William [charmley.william@epa.gov]
Subject: FW: Materials for today's 3pm SRE meeting
Attachments: Briefing Paper on Ex. 4 CBI Settlement Offer - 042020.docx; Legal Questions Gap-Filling Petitions 042220.docx; Gap-Filling Petition Status Table 042220.docx

Hi Bill,

The meeting with Anne was on 4/22.

Thanks,

Byron

Byron Bunker
 Director Compliance Division
 Office of Transportation and Air Quality
 Environmental Protection Agency
 2000 Traverwood Drive
 Ann Arbor, MI 48105
Bunker.Byron@epa.gov
 Phone: (734) 214-4155

Ex. 6 Personal Privacy (PP)

From: Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Sent: Wednesday, April 22, 2020 2:25 PM
To: Cohen, Janet <cohen.janet@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Machiele, Paul <machiele.paul@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Li, Ryland (Shengzhi) <Li.Ryland@epa.gov>; Caballero, Kathryn <Caballero.Kathryn@epa.gov>
Subject: Materials for today's 3pm SRE meeting

Hi folks—here are the materials for the 3pm meeting. Please forward as appropriate. Thanks—Ben

EPA Staff Draft – Deliberative

Gap-Filling Petitions Sent to DOE: 8 Companies, 12 Refineries and 49 petitions¹ as of April 20, 2020

	2010	2011	2012	2013	2014	2015	2016	Total
New Petition	1	5	5	7	8	7	6	39
Original Petition Withdrawn, resubmitted for consideration				1				1
Reconsideration where DOE recommended 0%		1 Denied based on DOE study	1 Denied based on DOE study	1 Before DOE recommended 50%				3
Reconsideration where DOE recommended 50%					3	3		6
Total	1	6	6	9	11	10	6	49

How many more can we expect?

Ex. 5 Deliberative Process (DP)

	2010	2011	2012	2013	2014	2015	2016	2017	Total
New Petition	1	11	12	18	20	18	13	3	96
Refinery Did Not Qualify						1			1
Reconsideration where DOE recommended 0%		2 Denied based on DOE study	2 Denied based on DOE study	4 Ex. 5 Deliberative Process (DP) DOE did not recommend 50% at this time)	1	1	1	1	12
Reconsideration where DOE recommended 50%						2			2
Reconsideration where denial was upheld upon review				1 Ex. 4 CBI / Ex. 5 Deliberative					1
Total	1	13	14	23	21	22	14	4	112

¹ This does not include the two petitions from **Ex. 4 CBI** for 2018. If these petitions are included, then 51 new petitions for prior years were sent to DOE.

Message

From: Master, Barbora [Master.Barbora@epa.gov]
Sent: 11/19/2018 3:05:11 PM
To: Orlin, David [Orlin.David@epa.gov]; Le, Madison [Le.Madison@epa.gov]
CC: Weihrauch, John [Weihrauch.John@epa.gov]; Larson, Ben [Larson.Ben@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]; Nelson, Karen [nelson.karen@epa.gov]; McKenna, Chris [McKenna.Chris@epa.gov]; Parsons, Nick [Parsons.Nick@epa.gov]; Burkholder, Dallas [burkholder.dallas@epa.gov]; Bunker, Byron [bunker.byron@epa.gov]; Machiele, Paul [machiele.paul@epa.gov]; Stahle, Susan [Stahle.Susan@epa.gov]; Sutton, Tia [sutton.tia@epa.gov]; Gustafson, Kurt [Gustafson.Kurt@epa.gov]
Subject: RE: ISO some help on declaration for opposition to PRUITT motion to stay
Attachments: Monroe Energy comments.pdf

In their comments to 2019 RVO, Monroe actually put together a nice chart of D6 and D4 RIN price (Argus) fluctuations from Jan/16 to Oct/17 and marked events along the way that coincided with price spikes. See page 34 of the attached.

Barbora Master
 U.S. Environmental Protection Agency
 202-343-9899

From: Orlin, David
Sent: Monday, November 19, 2018 9:45 AM
To: Le, Madison <Le.Madison@epa.gov>
Cc: Weihrauch, John <Weihrauch.John@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; McKenna, Chris <mckenna.chris@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Burkholder, Dallas <burkholder.dallas@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Machiele, Paul <machiele.paul@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Sutton, Tia <sutton.tia@epa.gov>; Gustafson, Kurt <Gustafson.Kurt@epa.gov>; Master, Barbora <Master.Barbora@epa.gov>
Subject: RE: ISO some help on declaration for opposition to PRUITT motion to stay

Ex. 5 Deliberative Process (DP) / Attorney Work Product

David Orlin
 U.S. EPA, Office of General Counsel
 (202) 564-1222

From: Le, Madison
Sent: Monday, November 19, 2018 8:35 AM
To: Orlin, David <Orlin.David@epa.gov>
Cc: Weihrauch, John <Weihrauch.John@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; McKenna, Chris <mckenna.chris@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Burkholder, Dallas <burkholder.dallas@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Machiele, Paul <machiele.paul@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Sutton, Tia <sutton.tia@epa.gov>; Gustafson, Kurt <Gustafson.Kurt@epa.gov>; Master, Barbora <Master.Barbora@epa.gov>
Subject: Re: ISO some help on declaration for opposition to PRUITT motion to stay

Adding Kurt and Barbora to help with some of the arguments on biodiesel nameplate vs actual. I think Paul is lately correct that capital investment of biodiesel plant is small and so to build out capacity is easy. I think availability of feedstocks and competitive cost factors are one significant why volumes are down.

Ex. 5 Deliberative Process (DP)

Sent from my iPhone

On Nov 18, 2018, at 8:15 PM, Orlin, David <Orlin.David@epa.gov> wrote:

Sorry for the wide cast on this email — I need both some factual information on SREs and some RIN market information and not really sure who can help, especially in the next day or so if possible — can someone let me know if this is easy enough to pull together in a day or two or when you think someone might be able to have it?

We have an opposition to the motion for stay in the PRUITT litigation (if that doesn't sound familiar, feel free to ask) due Monday Dec. 3. Litigation over stays, unlike our usual litigation practice, depends heavily on declarations (statements under oath explaining why harm is or isn't so imminent that the court needs to get involved right away). Sue is out until 11/28 and DOJ will need to see a draft of our (or, most likely, Byron's) declaration before she is back (and preferably before Thanksgiving) in order to be able to get us a draft.

Sue (before she left) and I are working on a draft declaration and I'd be happy to share it when it's a little more filled out, but for now it would be great if I could just get some information on the following topics —

- 1) RINs generated for Sinclair and HollyFrontier as a result of the vacated and remanded decisions - how many 2014 and 2015 RINs were there for each refinery, when were the replacement RINs generated, do we know what the status is those RINs is (have they been sold or retired?) and what is the total RIN production for the years for which the replacement RINs were generated?

2)

Ex. 5 Deliberative Process (DP) / Attorney Work Product

3)

As noted above, it would be great if I could get at least an estimate of how complicated it is to get this information by COB Monday so I could think about what we can get to DOJ when.

Thanks very much, and sorry for the firedrill. Feel free to ask me any followup questions that you'd like.

David Orlin
U.S. EPA, Office of General Counsel
(202) 564-1222

Message

From: Stahle, Susan [Stahle.Susan@epa.gov]
Sent: 4/17/2018 8:37:24 PM
To: Orlin, David [Orlin.David@epa.gov]
CC: Cohen, Janet [cohen.janet@epa.gov]
Subject: FW: first draft outline for wehrum briefing
Attachments: 4_17_18 draft bw small refinery update.docx

FYI.

I have only able been able to skim this so far and my initial reaciton is to delete this bullet:

Ex. 5 Deliberative Process (DP) / Attorney Work Product

The rest generally looks ok.

Susan Stahle
 Attorney-Advisor
 Air and Radiation Law Office
 Office of General Counsel
 U.S. Environmental Protection Agency
 202-564-1272 (ph)
 202-564-5603 (fax)
 stahle.susan@epa.gov

From: Cohen, Janet
Sent: Tuesday, April 17, 2018 3:11 PM
To: Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Machiele, Paul <machiele.paul@epa.gov>; McKenna, Chris <McKenna.Chris@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Piotrowski, Greg <piotrowski.greg@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Sutton, Tia <sutton.tia@epa.gov>; Weihrauch, John <Weihrauch.John@epa.gov>
Subject: first draft outline for wehrum briefing

All – here’s an outline for your review. It follows a structure that Byron suggested but please send other ideas, comments, suggestions, content, etc. etc. if you notice something important missing and/or think something else would work better.

Tia, please add or send me your FOIA lists.

Ben, I’ll revise after I hear back from people but generally do you think this is ok for use with Chris tomorrow? - j. -

Message

From: Stahle, Susan [Stahle.Susan@epa.gov]
Sent: 12/2/2020 5:39:29 PM
To: Bunker, Byron [bunker.byron@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]; Nelson, Karen [nelson.karen@epa.gov]; Michaels, Lauren [Michaels.Lauren@epa.gov]
CC: Hengst, Benjamin [Hengst.Benjamin@epa.gov]
Subject: FW: NEW LITIGATION CAA [Ex. 4 CBI] v. EPA, No. 20-61116 (5th Cir.)
Attachments: [Ex. 4 CBI] No. 20-61116 (5th Cir. filed Nov. 27 2020).pdf

FYI

Susan Stahle
 Air and Radiation Law Office
 Office of General Counsel
 U.S. Environmental Protection Agency
 WJCN-7502B
 202-564-1272

From: Stahle, Susan
Sent: Wednesday, December 2, 2020 12:38 PM
To: OGC Immediate Office MGMT <OGC_Immediate_Office_MGMT@epa.gov>; OGC Immediate Office Support <OGCFrontOfficeSupportStaff@epa.gov>
Cc: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>; Miller, Meredith <Miller.Meredith@epa.gov>
Subject: NEW LITIGATION CAA [Ex. 4 CBI] v. EPA, No. 20-61116 (5th Cir.)

On November 27, 2020, [Ex. 4 CBI] filed the attached petition for review in the Fifth Circuit Court of Appeals challenging a decision EPA issued on September 14, 2020, entitled "Denial of Small Refinery Gap-Filling Petitions." This decision included a denial of [Ex. 4 CBI] gap-filling petitions for one or more of the RFS compliance years 2011 through 2016. The decision is attached as Exhibit A to the petition for review.

Susan Stahle
 Air and Radiation Law Office
 Office of General Counsel
 U.S. Environmental Protection Agency
 WJCN-7502B
 202-564-1272

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

ERGON REFINING, INC.,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

Case No. _____

PETITION FOR REVIEW

Pursuant to Section 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b), and Federal Rule of Appellate Procedure 15(a), Ergon Refining, Inc. (“Petitioner”) petitions this Court for review of the action of the Administrator of the United States Environmental Protection Agency (“EPA”) issued on September 14, 2020 and titled “Denial of Small Refinery Gap-Filling Petitions.” This agency action purported to deny the petitions submitted by Petitioner for small refinery exemptions under the Renewable Fuel Standard program for one or more of the compliance years 2011 through 2016. A copy of the action is attached as Exhibit A.

The agency action states that, “pursuant to section 307(b) [of the Clean Air Act], any petitions for review of this final action must be filed . . . within 60 days

from the date this final action is published in the Federal Register.” Exhibit A at 5.

To Petitioner’s knowledge, however, the action has not yet been published in the Federal Register. EPA’s regulations provide:

Unless the Administrator otherwise explicitly provides in a particular promulgation, approval, or action, the time and date of such promulgation, approval or action for purposes of the second sentence of section 307(b)(1) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on (a) for a Federal Register document, the date when the document is published in the Federal Register, or (b) for any other document, two weeks after it is signed.

40 C.F.R. § 23.3. Therefore, out of an abundance of caution, Petitioner files this petition for review within the time period prescribed by 40 C.F.R. § 23.3(b) and 42 U.S.C. § 7607(b)(1).

Petitioner files this petition for review of agency action in this Court, the regional circuit in which Petitioner is located, because Petitioner believes that jurisdiction and venue are proper here pursuant to 42 U.S.C. § 7607(b)(1). As a protective measure, however, Petitioner is also filing a petition for review of the same agency action in the United States Court of Appeals for the District of Columbia Circuit, because EPA stated in the agency action that “any petitions for review of this final action must be filed in the Court of Appeals for the District of Columbia Circuit.” Exhibit A at 5.

The Certificate of Interested Persons required by Federal Rule of Appellate Procedure 26.1 and 5th Circuit Rule 26.1.1 is attached as Exhibit B.

Dated: November 27, 2020

Respectfully submitted,

s/ Eric B. Wolff

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Jonathan G. Hardin (*admission
application pending*)
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JHardin@perkinscoie.com

Attorneys for Petitioner

EXHIBIT A



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SUBJECT: Denial of Small Refinery Gap-Filling Petitions  THE ADMINISTRATOR
FROM: Andrew Wheeler, Administrator of the U.S. Environmental Protection Agency
TO: Small Refineries That Have Submitted Gap-Filling Petitions for an Exemption from the Renewable Fuel Standard Program

Section 211(o)(9) of the Clean Air Act (CAA or the Act) authorizes the Administrator to temporarily exempt small refineries from their renewable fuel volume obligations under the Renewable Fuel Standard (RFS) program “for the reason of disproportionate economic hardship.” Congress created three classes of exemptions from the RFS program for “small refiner[ies],” which are defined as refineries with crude oil throughput averaging 75,000 barrels or less per day for a calendar year.¹ First, Congress granted all small refineries a blanket exemption from the RFS program until 2011.² Second, Congress directed the Department of Energy (DOE) to conduct a study³ “to determine whether compliance with the requirements of [the RFS program] would impose a disproportionate economic hardship on small refineries.”⁴ For any small refinery that DOE determined would experience disproportionate economic hardship, Congress directed EPA to “extend the exemption under clause (i) for the small refinery for a period of not less than 2 additional years.”⁵ Third, Congress provided that a small refinery “may at any time petition the Administrator for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship.”⁶ In considering such a petition, “the Administrator, in consultation with the Secretary of Energy, shall consider the findings of the [DOE] study and other economic factors.”⁷

EPA issued regulations governing small refinery exemptions (SRE) in 2010 and amended them in 2014.⁸ The 2010 regulations implemented all three classes of exemptions and defined “small refinery” the same for all three classes. EPA regarded as eligible for an exemption only those small refineries that qualified for, and thus received, the blanket statutory exemption by not

¹ CAA section 211(o)(9), (o)(1)(K); 40 C.F.R. 80.1401.

² CAA section 211(o)(9)(A)(i).

³ “Small Refinery Exemption Study, An Investigation into Disproportionate Economic Hardship,” Office of Policy and International Affairs, U.S. Department of Energy, March 2011 (DOE Small Refinery Study).

⁴ CAA section 211(o)(9)(A)(ii)(I).

⁵ CAA section 211(o)(9)(A)(ii)(II).

⁶ CAA section 211(o)(9)(B)(i).

⁷ CAA section 211(o)(9)(B)(ii); 40 C.F.R. 80.1441.

⁸ 75 Fed. Reg. 14,670 (Mar. 26, 2010); 79 Fed. Reg. 42,128 (July 18, 2014).

exceeding the 75,000-barrel-per-day crude-throughput threshold for the 2006 calendar year.⁹ In 2014, EPA amended its regulations and considered a small refinery eligible to petition for an exemption under the statute based on a small refinery's crude throughput during the desired exemption period and the year immediately preceding the petition.¹⁰ EPA was therefore considering petitions and granting exemptions based on this eligibility provision and its analysis of disproportionate economic hardship (DEH). EPA did not require a small refinery to demonstrate receipt of a continuous exemption to evaluate its petition.

As part of EPA's evaluation process, and consistent with its statutory obligation to consult DOE, EPA asks DOE to evaluate all the information EPA receives from each petitioner. DOE's expertise in evaluating economic conditions at U.S. refineries is fundamental to the process both DOE and EPA use to identify whether DEH exists for petitioning small refineries in the context of the RFS program. After evaluating the information submitted by the petitioner, DOE provides a recommendation to EPA on whether a small refinery merits an exemption from RFS obligations. As described in the DOE Small Refinery Study, DOE assesses the potential for DEH at a small refinery based on two sets of metrics. One set of metrics assesses structural and economic conditions that could disproportionately affect the refinery (collectively described as "disproportionate impacts" when referencing Section 1 and Section 2 of DOE's scoring matrix). The other set of metrics assesses the financial conditions that could cause viability concerns at the refinery (described as "viability impairment" when referencing Section 3 of DOE's scoring matrix). DOE's recommendation informs EPA's decision about whether to grant or deny an SRE petition for a small refinery.

Previously, DOE and EPA had considered that DEH exists only when a small refinery demonstrates that it experiences *both* disproportionate impacts *and* viability impairment. However, in response to concerns that the two agencies' threshold for establishing DEH was too stringent, Congress in 2016 clarified that DEH can exist if DOE finds that a small refinery is experiencing *either* disproportionate impacts *or* viability impairment, in which case Congress directed DOE to recommend a 50 percent exemption from the RFS. This was relayed in an explanatory statement accompanying the 2016 Appropriations Act that stated: "If the Secretary finds that either of these two components exists, the Secretary is directed to recommend to the EPA Administrator a 50 percent waiver of RFS requirements for the petitioner."¹¹ Congress subsequently directed EPA to follow DOE's recommendation, and to report to Congress if it did not.¹²

⁹ CAA section 211(o)(1)(K); 40 C.F.R. 80.1141(a)(1), 80.1441(a)(1).

¹⁰ CAA section 211(o)(9)(B)(i); 40 C.F.R. 80.1441(e)(2)(iii).

¹¹ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (2015). The Explanatory Statement is available at: <https://rules.house.gov/bill/114/hr-2029-sa>.

¹² Senate Report 114-281 ("When making decisions about small refinery exemptions under the RFS program, the Agency is directed to follow DOE's recommendations which are to be based on the original 2011 Small Refinery Exemption Study prepared for Congress and the conference report to division D of the Consolidated Appropriations Act of 2016. Should the Administrator disagree with a waiver recommendation from the Secretary of Energy, either to approve or deny, the Agency shall provide a report to the Committee on Appropriations and to the Secretary of

On January 24, 2020, in the *Renewable Fuels Association (RFA)* case, the Tenth Circuit Court of Appeals decided a challenge to EPA's grant of small refinery exemptions to three small refineries.¹³ The court held that EPA had exceeded its CAA statutory authority and impermissibly granted the petitions because the three refineries had not received an exemption for all prior years of the RFS program.¹⁴ According to the Court, "[b]ecause an 'extension' requires a small refinery exemption in prior years to prolong, enlarge or add to, the three refinery petitions in this case were improvidently granted. The amended Clean Air Act did not authorize the EPA to grant these petitions."¹⁵

Since March 2020, 17 small refineries in 14 states in seven federal judicial circuits have submitted 68 individual petitions asking EPA either to reconsider exemption denials (1) or grant exemptions for prior years in which the refineries had not sought them (54). It appears that these small refineries have attempted to fill their exemption extension "gaps" through the filing of these petitions. Thus, as shorthand, EPA generically calls all these petitions "gap-filling petitions" (GFPs). The majority of the GFPs were received in March 2020, although additional GFPs were received in June, August and September of 2020.

Starting in April 2020, EPA provided DOE with these GFPs spanning from RFS compliance years 2011 to 2018 to be evaluated for DEH. DOE transmitted its findings on 54 of the 68 GFPs at the end of July 2020.¹⁶ In its recommendations for those GFPs for which it provided its findings, DOE found that while most of the small refineries had demonstrated some degree of structural hardships during the years related to their petitions, none of the small refineries had demonstrated that their viability was affected. For these reasons, DOE recommended either no relief or 50 percent relief for each of the small refineries that submitted GFPs.

As an initial matter, it is not clear whether the "at any time" language in the statute also allows EPA to grant these gap-filling petitions. *See* CAA 211(o)(9)(B)(i). The statutory language certainly does not preclude EPA from considering the time that has elapsed between the compliance year and when a small refinery petitions for relief as a factor in determining whether to grant such relief. Indeed, it seems unlikely that Congress contemplated or intended to allow a small refinery to obtain hardship relief through submitting a petition in calendar year 2020 for RFS compliance year 2011, for example. Moreover, it is unclear whether EPA has authority to grant a GFP when the small refinery which submitted it already complied with its RFS obligations for that prior year. Where a refinery has successfully complied with the RFS and did not apply for hardship relief until a number of years after the purported hardship, EPA finds that it is appropriate for such refinery to clearly and convincingly demonstrate hardship, particularly

Energy that explains the Agency position. Such report shall be provided 10 days prior to issuing a decision on a waiver petition.").

¹³ *Renewable Fuels Ass'n et al. v. EPA*, 948 F.3d 1206 (10th Cir. 2020) (*RFA* decision).

¹⁴ *Id.* at 1244-1249.

¹⁵ *Id.* at 1249.

¹⁶ DOE has not provided its recommendations for the remaining 14 GFPs. This document does not address those petitions.

in light of open questions regarding the Agency's statutory authority and the availability of relief for compliance years that have long since been closed.¹⁷ EPA has not fully explored these and other difficult legal issues raised by these petitions. Regardless, assuming without deciding that these petitions are properly before the Agency, I provide my decisions on them below.

Based on DOE's recommendations, I am denying exemptions for the gap-filling petitions that seek reconsideration of prior EPA decisions because those small refineries have not provided any new information that would necessitate EPA changing its prior decisions for those RFS compliance years. DOE and EPA thoroughly and carefully evaluated the petitions for those years at that time, and EPA has found nothing in these new submissions that would merit a change in those previous decisions. These small refineries did not demonstrate then or now that they experienced disproportionate economic hardship from compliance with the RFS program and do not warrant an exemption for those RFS compliance years. EPA recognizes that some of its small refinery exemption policies may have changed between 2011 and the present. However, we do not believe it is appropriate in these cases to change our past decisions based on new policies, especially given the length of time that has passed since our original decisions, the lack of material new information supporting a different outcome, and the remedial difficulties associated with providing relief many years after compliance was already achieved.

Based on DOE's recommendations, I am denying exemptions for those gap-filling petitions where DOE recommended no relief. In these instances, EPA agrees with DOE's evaluation and recommendation that these small refineries did not demonstrate disproportionate economic hardship from compliance with the RFS program for those RFS compliance years. Several of these petitions alleging hardship date back to 2011. If such hardship was occurring in those prior RFS compliance years, these small refineries likely would have petitioned for relief in each of those preceding RFS compliance years. Instead, these small refineries consistently complied with their annual RFS obligations while continuing to participate in the refining industry. Given such circumstances, these small refineries have not demonstrated the requisite hardship to garner exemptions now for those past RFS compliance years.

I am also denying exemptions for all the gap-filling petitions where DOE recommended 50 percent relief. EPA doubts that Congress intended to exempt small refineries that already successfully complied with their RFS obligations many years past without demonstrating that they experienced disproportionate economic hardship as a result of that compliance. Despite the difficulty DOE may have identified through use of its scoring matrix, that difficulty was not enough to prevent these same small refineries from fully complying with their past annual RFS obligations and remain a commercial entity. Again, these small refineries have not demonstrated disproportionate economic hardship in 2020 for RFS compliance years 2011 through 2018 when those same refineries already successfully complied with those prior RFS obligations.

This decision is appropriate under the Act and is consistent with the case law recognizing EPA's

¹⁷ EPA also notes that it is not clearly established whether a so-called "continuous exemption" is created by EPA granting a gap-filling petition many years after the small refinery has already complied with its RFS obligation for that year.

independent authority in deciding whether to grant or deny RFS small refinery petitions.¹⁸ This decision is a nationally applicable final agency action for purposes of CAA section 307(b)(1). In the alternative, EPA finds that this final action is based on a determination of nationwide scope or effect for purposes of CAA section 307(b)(1). This decision addresses gap-filling petitions filed by 17 small refineries in 14 states and spanning seven federal judicial circuits together in a single action, applying the same analysis to similarly situated small refineries, as explained above. For this reason, this final action is nationally applicable, or, in the alternative, EPA finds that this action is based on a determination of nationwide scope or effect for purposes of section 307(b)(1). Thus, pursuant to section 307(b), any petitions for review of this final action must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date this final action is published in the Federal Register.

This action is not a rulemaking and is not subject to the various statutory and other provisions applicable to a rulemaking.

¹⁸ *Sinclair Wyoming Refining Co. v. EPA*, 874 F.3d 1159, 1166 (10th Cir. 2017); *See also Hermes Consol.*, 787 F.3d at 574-575; *Lion Oil Co. v. EPA*, 792 F.3d 978, 982-983 (8th Cir. 2015).

EXHIBIT B

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

ERGON REFINING, INC.,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

Case No. _____

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and 5th Circuit Rule 26.1.1, Petitioner Ergon Refining, Inc., provides the following certificate of interested persons:

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. **Ergon Refining, Inc.**, incorporated under the laws of Mississippi, is a refiner of petroleum products. Ergon Refining, Inc. is wholly owned by parent company Ergon, Inc. No publicly held company has a 10 percent or greater ownership interest in it.

2. **Ergon, Inc.**, is the parent company of Ergon Refining, Inc.

Petitioner will file a revised certificate of interested persons should it become aware of a change in corporate ownership interests that would affect the disclosures required by Rule 26.1.

Dated: November 27, 2020

Respectfully submitted,

s/ Eric B. Wolff

Eric B. Wolff
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 89101-3099
Telephone: 206.359.3779
Facsimile: 206.359.9000
EWolff@perkinscoie.com

Jonathan G. Hardin (*admission
application pending*)
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: 202.654.6297
Facsimile: 202.654.6211
JHardin@perkinscoie.com

Attorneys for Petitioner

CERTIFICATE OF SERVICE

Pursuant to Federal Rules of Appellate Procedure 3(d), 15(c) and 25, 5th Circuit Rule 25, and 40 C.F.R. § 23.12(a), I hereby certify that on November 27, 2020, I will cause copies of the foregoing Petition for Review and Certificate of Interested Persons to be served by certified mail, return receipt requested upon the following:

HON. ANDREW WHEELER, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

CORRESPONDENCE CONTROL UNIT
Office of General Counsel (2311)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

HON. WILLIAM BARR
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

HON. JEFFREY BOSSERT CLARK
Assistant Attorney General
Environmental and Natural Resources Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dated: November 27, 2020

s/ Eric B. Wolff
Eric B. Wolff
PERKINS COIE LLP

Message

From: Stahle, Susan [Stahle.Susan@epa.gov]
Sent: 12/2/2020 5:28:37 PM
To: Bunker, Byron [bunker.byron@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]; Nelson, Karen [nelson.karen@epa.gov]; Michaels, Lauren [Michaels.Lauren@epa.gov]
CC: Hengst, Benjamin [Hengst.Benjamin@epa.gov]
Subject: FW: NEW LITIGATION CAA - [Ex. 4 CBI] EPA, No. 20-61116 (5th Cir.)
Attachments: [Ex. 4 CBI] 20-61116 (5th Cir. filed Nov. 27 2020).pdf

FYI

Susan Stahle
 Air and Radiation Law Office
 Office of General Counsel
 U.S. Environmental Protection Agency
 WJCN-7502B
 202-564-1272

From: Stahle, Susan
Sent: Wednesday, December 2, 2020 12:28 PM
To: OGC Immediate Office MGMT <OGC_Immediate_Office_MGMT@epa.gov>; OGC Immediate Office Support <OGCFrontOfficeSupportStaff@epa.gov>
Cc: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>; Miller, Meredith <Miller.Meredith@epa.gov>
Subject: NEW LITIGATION CAA - [Ex. 4 CBI] EPA, No. 20-61116 (5th Cir.)

On November 27, 2020, [Ex. 4 CBI] filed the attached petition for review in the Fifth Circuit Court of Appeals challenging a decision EPA issued on September 14, 2020, entitled "Denial of Small Refinery Gap-Filling Petitions." This decision included a denial of [Ex. 4 CBI] gap-filling petitions for one or more of the RFS compliance years 2011 through 2016. The decision is attached as Exhibit A to the petition for review.

Susan Stahle
 Air and Radiation Law Office
 Office of General Counsel
 U.S. Environmental Protection Agency
 WJCN-7502B
 202-564-1272

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

PLACID REFINING COMPANY LLC,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

Case No. _____

PETITION FOR REVIEW

Pursuant to Section 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b), and Federal Rule of Appellate Procedure 15(a), Placid Refining Company LLC (“Petitioner”) petitions this Court for review of the action of the Administrator of the United States Environmental Protection Agency (“EPA”) issued on September 14, 2020 and titled “Denial of Small Refinery Gap-Filling Petitions.” This agency action purported to deny the petitions submitted by Petitioner for small refinery exemptions under the Renewable Fuel Standard program for one or more of the compliance years 2011 through 2016. A copy of the action is attached as Exhibit A.

The agency action states that, “pursuant to section 307(b) [of the Clean Air Act], any petitions for review of this final action must be filed . . . within 60 days

from the date this final action is published in the Federal Register.” Exhibit A at 5.

To Petitioner’s knowledge, however, the action has not yet been published in the Federal Register. EPA’s regulations provide:

Unless the Administrator otherwise explicitly provides in a particular promulgation, approval, or action, the time and date of such promulgation, approval or action for purposes of the second sentence of section 307(b)(1) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on (a) for a Federal Register document, the date when the document is published in the Federal Register, or (b) for any other document, two weeks after it is signed.

40 C.F.R. § 23.3. Therefore, out of an abundance of caution, Petitioner files this petition for review within the time period prescribed by 40 C.F.R. § 23.3(b) and 42 U.S.C. § 7607(b)(1).

Petitioner files this petition for review of agency action in this Court, the regional circuit in which Petitioner is located, because Petitioner believes that jurisdiction and venue are proper here pursuant to 42 U.S.C. § 7607(b)(1). As a protective measure, however, Petitioner is also filing a petition for review of the same agency action in the United States Court of Appeals for the District of Columbia Circuit, because EPA stated in the agency action that “any petitions for review of this final action must be filed in the Court of Appeals for the District of Columbia Circuit.” Exhibit A at 5.

The Certificate of Interested Persons required by Federal Rule of Appellate Procedure 26.1 and 5th Circuit Rule 26.1.1 is attached as Exhibit B.

Dated: November 27, 2020

Respectfully submitted,

s/ Eric B. Wolff

Eric B. Wolff
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 89101-3099
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Jonathan G. Hardin (*admission
application pending*)
PERKINS COIE LLP
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Washington, D.C. 20005-3960
Telephone: 202.654.6297
Facsimile: 202.654.6211
JHardin@perkinscoie.com

Attorneys for Petitioner

EXHIBIT A



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SUBJECT: Denial of Small Refinery Gap-Filling Petitions  THE ADMINISTRATOR
FROM: Andrew Wheeler, Administrator of the U.S. Environmental Protection Agency
TO: Small Refineries That Have Submitted Gap-Filling Petitions for an Exemption from the Renewable Fuel Standard Program

Section 211(o)(9) of the Clean Air Act (CAA or the Act) authorizes the Administrator to temporarily exempt small refineries from their renewable fuel volume obligations under the Renewable Fuel Standard (RFS) program “for the reason of disproportionate economic hardship.” Congress created three classes of exemptions from the RFS program for “small refiner[ies],” which are defined as refineries with crude oil throughput averaging 75,000 barrels or less per day for a calendar year.¹ First, Congress granted all small refineries a blanket exemption from the RFS program until 2011.² Second, Congress directed the Department of Energy (DOE) to conduct a study³ “to determine whether compliance with the requirements of [the RFS program] would impose a disproportionate economic hardship on small refineries.”⁴ For any small refinery that DOE determined would experience disproportionate economic hardship, Congress directed EPA to “extend the exemption under clause (i) for the small refinery for a period of not less than 2 additional years.”⁵ Third, Congress provided that a small refinery “may at any time petition the Administrator for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship.”⁶ In considering such a petition, “the Administrator, in consultation with the Secretary of Energy, shall consider the findings of the [DOE] study and other economic factors.”⁷

EPA issued regulations governing small refinery exemptions (SRE) in 2010 and amended them in 2014.⁸ The 2010 regulations implemented all three classes of exemptions and defined “small refinery” the same for all three classes. EPA regarded as eligible for an exemption only those small refineries that qualified for, and thus received, the blanket statutory exemption by not

¹ CAA section 211(o)(9), (o)(1)(K); 40 C.F.R. 80.1401.

² CAA section 211(o)(9)(A)(i).

³ “Small Refinery Exemption Study, An Investigation into Disproportionate Economic Hardship,” Office of Policy and International Affairs, U.S. Department of Energy, March 2011 (DOE Small Refinery Study).

⁴ CAA section 211(o)(9)(A)(ii)(I).

⁵ CAA section 211(o)(9)(A)(ii)(II).

⁶ CAA section 211(o)(9)(B)(i).

⁷ CAA section 211(o)(9)(B)(ii); 40 C.F.R. 80.1441.

⁸ 75 Fed. Reg. 14,670 (Mar. 26, 2010); 79 Fed. Reg. 42,128 (July 18, 2014).

exceeding the 75,000-barrel-per-day crude-throughput threshold for the 2006 calendar year.⁹ In 2014, EPA amended its regulations and considered a small refinery eligible to petition for an exemption under the statute based on a small refinery's crude throughput during the desired exemption period and the year immediately preceding the petition.¹⁰ EPA was therefore considering petitions and granting exemptions based on this eligibility provision and its analysis of disproportionate economic hardship (DEH). EPA did not require a small refinery to demonstrate receipt of a continuous exemption to evaluate its petition.

As part of EPA's evaluation process, and consistent with its statutory obligation to consult DOE, EPA asks DOE to evaluate all the information EPA receives from each petitioner. DOE's expertise in evaluating economic conditions at U.S. refineries is fundamental to the process both DOE and EPA use to identify whether DEH exists for petitioning small refineries in the context of the RFS program. After evaluating the information submitted by the petitioner, DOE provides a recommendation to EPA on whether a small refinery merits an exemption from RFS obligations. As described in the DOE Small Refinery Study, DOE assesses the potential for DEH at a small refinery based on two sets of metrics. One set of metrics assesses structural and economic conditions that could disproportionately affect the refinery (collectively described as "disproportionate impacts" when referencing Section 1 and Section 2 of DOE's scoring matrix). The other set of metrics assesses the financial conditions that could cause viability concerns at the refinery (described as "viability impairment" when referencing Section 3 of DOE's scoring matrix). DOE's recommendation informs EPA's decision about whether to grant or deny an SRE petition for a small refinery.

Previously, DOE and EPA had considered that DEH exists only when a small refinery demonstrates that it experiences *both* disproportionate impacts *and* viability impairment. However, in response to concerns that the two agencies' threshold for establishing DEH was too stringent, Congress in 2016 clarified that DEH can exist if DOE finds that a small refinery is experiencing *either* disproportionate impacts *or* viability impairment, in which case Congress directed DOE to recommend a 50 percent exemption from the RFS. This was relayed in an explanatory statement accompanying the 2016 Appropriations Act that stated: "If the Secretary finds that either of these two components exists, the Secretary is directed to recommend to the EPA Administrator a 50 percent waiver of RFS requirements for the petitioner."¹¹ Congress subsequently directed EPA to follow DOE's recommendation, and to report to Congress if it did not.¹²

⁹ CAA section 211(o)(1)(K); 40 C.F.R. 80.1141(a)(1), 80.1441(a)(1).

¹⁰ CAA section 211(o)(9)(B)(i); 40 C.F.R. 80.1441(e)(2)(iii).

¹¹ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (2015). The Explanatory Statement is available at: <https://rules.house.gov/bill/114/hr-2029-sa>.

¹² Senate Report 114-281 ("When making decisions about small refinery exemptions under the RFS program, the Agency is directed to follow DOE's recommendations which are to be based on the original 2011 Small Refinery Exemption Study prepared for Congress and the conference report to division D of the Consolidated Appropriations Act of 2016. Should the Administrator disagree with a waiver recommendation from the Secretary of Energy, either to approve or deny, the Agency shall provide a report to the Committee on Appropriations and to the Secretary of

On January 24, 2020, in the *Renewable Fuels Association (RFA)* case, the Tenth Circuit Court of Appeals decided a challenge to EPA's grant of small refinery exemptions to three small refineries.¹³ The court held that EPA had exceeded its CAA statutory authority and impermissibly granted the petitions because the three refineries had not received an exemption for all prior years of the RFS program.¹⁴ According to the Court, "[b]ecause an 'extension' requires a small refinery exemption in prior years to prolong, enlarge or add to, the three refinery petitions in this case were improvidently granted. The amended Clean Air Act did not authorize the EPA to grant these petitions."¹⁵

Since March 2020, 17 small refineries in 14 states in seven federal judicial circuits have submitted 68 individual petitions asking EPA either to reconsider exemption denials (1) or grant exemptions for prior years in which the refineries had not sought them (54). It appears that these small refineries have attempted to fill their exemption extension "gaps" through the filing of these petitions. Thus, as shorthand, EPA generically calls all these petitions "gap-filling petitions" (GFPs). The majority of the GFPs were received in March 2020, although additional GFPs were received in June, August and September of 2020.

Starting in April 2020, EPA provided DOE with these GFPs spanning from RFS compliance years 2011 to 2018 to be evaluated for DEH. DOE transmitted its findings on 54 of the 68 GFPs at the end of July 2020.¹⁶ In its recommendations for those GFPs for which it provided its findings, DOE found that while most of the small refineries had demonstrated some degree of structural hardships during the years related to their petitions, none of the small refineries had demonstrated that their viability was affected. For these reasons, DOE recommended either no relief or 50 percent relief for each of the small refineries that submitted GFPs.

As an initial matter, it is not clear whether the "at any time" language in the statute also allows EPA to grant these gap-filling petitions. *See* CAA 211(o)(9)(B)(i). The statutory language certainly does not preclude EPA from considering the time that has elapsed between the compliance year and when a small refinery petitions for relief as a factor in determining whether to grant such relief. Indeed, it seems unlikely that Congress contemplated or intended to allow a small refinery to obtain hardship relief through submitting a petition in calendar year 2020 for RFS compliance year 2011, for example. Moreover, it is unclear whether EPA has authority to grant a GFP when the small refinery which submitted it already complied with its RFS obligations for that prior year. Where a refinery has successfully complied with the RFS and did not apply for hardship relief until a number of years after the purported hardship, EPA finds that it is appropriate for such refinery to clearly and convincingly demonstrate hardship, particularly

Energy that explains the Agency position. Such report shall be provided 10 days prior to issuing a decision on a waiver petition.").

¹³ *Renewable Fuels Ass'n et al. v. EPA*, 948 F.3d 1206 (10th Cir. 2020) (*RFA* decision).

¹⁴ *Id.* at 1244-1249.

¹⁵ *Id.* at 1249.

¹⁶ DOE has not provided its recommendations for the remaining 14 GFPs. This document does not address those petitions.

in light of open questions regarding the Agency's statutory authority and the availability of relief for compliance years that have long since been closed.¹⁷ EPA has not fully explored these and other difficult legal issues raised by these petitions. Regardless, assuming without deciding that these petitions are properly before the Agency, I provide my decisions on them below.

Based on DOE's recommendations, I am denying exemptions for the gap-filling petitions that seek reconsideration of prior EPA decisions because those small refineries have not provided any new information that would necessitate EPA changing its prior decisions for those RFS compliance years. DOE and EPA thoroughly and carefully evaluated the petitions for those years at that time, and EPA has found nothing in these new submissions that would merit a change in those previous decisions. These small refineries did not demonstrate then or now that they experienced disproportionate economic hardship from compliance with the RFS program and do not warrant an exemption for those RFS compliance years. EPA recognizes that some of its small refinery exemption policies may have changed between 2011 and the present. However, we do not believe it is appropriate in these cases to change our past decisions based on new policies, especially given the length of time that has passed since our original decisions, the lack of material new information supporting a different outcome, and the remedial difficulties associated with providing relief many years after compliance was already achieved.

Based on DOE's recommendations, I am denying exemptions for those gap-filling petitions where DOE recommended no relief. In these instances, EPA agrees with DOE's evaluation and recommendation that these small refineries did not demonstrate disproportionate economic hardship from compliance with the RFS program for those RFS compliance years. Several of these petitions alleging hardship date back to 2011. If such hardship was occurring in those prior RFS compliance years, these small refineries likely would have petitioned for relief in each of those preceding RFS compliance years. Instead, these small refineries consistently complied with their annual RFS obligations while continuing to participate in the refining industry. Given such circumstances, these small refineries have not demonstrated the requisite hardship to garner exemptions now for those past RFS compliance years.

I am also denying exemptions for all the gap-filling petitions where DOE recommended 50 percent relief. EPA doubts that Congress intended to exempt small refineries that already successfully complied with their RFS obligations many years past without demonstrating that they experienced disproportionate economic hardship as a result of that compliance. Despite the difficulty DOE may have identified through use of its scoring matrix, that difficulty was not enough to prevent these same small refineries from fully complying with their past annual RFS obligations and remain a commercial entity. Again, these small refineries have not demonstrated disproportionate economic hardship in 2020 for RFS compliance years 2011 through 2018 when those same refineries already successfully complied with those prior RFS obligations.

This decision is appropriate under the Act and is consistent with the case law recognizing EPA's

¹⁷ EPA also notes that it is not clearly established whether a so-called "continuous exemption" is created by EPA granting a gap-filling petition many years after the small refinery has already complied with its RFS obligation for that year.

independent authority in deciding whether to grant or deny RFS small refinery petitions.¹⁸ This decision is a nationally applicable final agency action for purposes of CAA section 307(b)(1). In the alternative, EPA finds that this final action is based on a determination of nationwide scope or effect for purposes of CAA section 307(b)(1). This decision addresses gap-filling petitions filed by 17 small refineries in 14 states and spanning seven federal judicial circuits together in a single action, applying the same analysis to similarly situated small refineries, as explained above. For this reason, this final action is nationally applicable, or, in the alternative, EPA finds that this action is based on a determination of nationwide scope or effect for purposes of section 307(b)(1). Thus, pursuant to section 307(b), any petitions for review of this final action must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date this final action is published in the Federal Register.

This action is not a rulemaking and is not subject to the various statutory and other provisions applicable to a rulemaking.

¹⁸ *Sinclair Wyoming Refining Co. v. EPA*, 874 F.3d 1159, 1166 (10th Cir. 2017); *See also Hermes Consol.*, 787 F.3d at 574-575; *Lion Oil Co. v. EPA*, 792 F.3d 978, 982-983 (8th Cir. 2015).

EXHIBIT B

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

PLACID REFINING COMPANY LLC,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

Case No. _____

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and 5th Circuit Rule 26.1.1, Petitioner Placid Refining Company LLC provides the following certificate of interested persons:

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. **Placid Refining Company LLC**, a limited liability company organized under the laws of Delaware, is a refiner of petroleum products. Placid Refining Company LLC is owned 100 percent by its parent companies Placid Holding Company and RR Refining, Inc. and

no publicly held company has a 10 percent or greater ownership interest in it.

2. **Placid Holding Company**, parent of Placid Refining Company LLC.
3. **RR Refining, Inc.**, parent of Placid Refining Company LLC.

Petitioner will file a revised certificate of interested persons should it become aware of a change in corporate ownership interests that would affect the disclosures required by Rule 26.1.

Dated: November 27, 2020

Respectfully submitted,

s/ Eric B. Wolff

Eric B. Wolff
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 89101-3099
Telephone: 206.359.3779
Facsimile: 206.359.9000
EWolff@perkinscoie.com

Jonathan G. Hardin (*admission
application pending*)
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: 202.654.6297
Facsimile: 202.654.6211
JHardin@perkinscoie.com

Attorneys for Petitioner

CERTIFICATE OF SERVICE

Pursuant to Federal Rules of Appellate Procedure 3(d), 15(c) and 25, 5th Circuit Rule 25, and 40 C.F.R. § 23.12(a), I hereby certify that on November 27, 2020, I will cause copies of the foregoing Petition for Review and Certificate of Interested Persons to be served by certified mail, return receipt requested upon the following:

HON. ANDREW WHEELER, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

CORRESPONDENCE CONTROL UNIT
Office of General Counsel (2311)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

HON. WILLIAM BARR
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

HON. JEFFREY BOSSERT CLARK
Assistant Attorney General
Environmental and Natural Resources Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dated: November 27, 2020

s/ Eric B. Wolff
Eric B. Wolff
PERKINS COIE LLP

Message

From: Orlin, David [Orlin.David@epa.gov]
Sent: 2/26/2020 3:24:29 PM
To: Cohen, Janet [cohen.janet@epa.gov]; Hengst, Benjamin [Hengst.Benjamin@epa.gov]; Bunker, Byron [bunker.byron@epa.gov]; Caballero, Kathryn [Caballero.Kathryn@epa.gov]
CC: Stahle, Susan [Stahle.Susan@epa.gov]; Michaels, Lauren [Michaels.Lauren@epa.gov]
Subject: RE: Revised action memo
Attachments: 2020-02-25_Memo on 2019 Small Refinery Exemption Petitions (ss) clean (jc markup) +do.docx

Here are my suggestions. Sorry I couldn't find a sharepoint version (either in my email or on sharepoint) so I just made my edits in the attached.

David Orlin
 U.S. EPA, Office of General Counsel
 (202) 564-1222

From: Cohen, Janet <cohen.janet@epa.gov>
Sent: Tuesday, February 25, 2020 5:42 PM
To: Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Caballero, Kathryn <Caballero.Kathryn@epa.gov>; Orlin, David <Orlin.David@epa.gov>
Cc: Stahle, Susan <Stahle.Susan@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>
Subject: FW: Revised action memo

Here's the version that I edited and posted to sharepoint. – j. -

From: Stahle, Susan <Stahle.Susan@epa.gov>
Sent: Tuesday, February 25, 2020 5:37 PM
To: Cohen, Janet <cohen.janet@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>
Subject: RE: Revised action memo

Great, thanks. Would be good if you could circulate this version to the larger group for their input. I'm headed out right now. Please include David Orlin.

Susan Stahle
 Air and Radiation Law Office
 Office of General Counsel
 U.S. Environmental Protection Agency
 WJCN-7502B
 202-564-1272

From: Cohen, Janet <cohen.janet@epa.gov>
Sent: Tuesday, February 25, 2020 5:23 PM
To: Michaels, Lauren <Michaels.Lauren@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>
Subject: RE: Revised action memo

And I just made some edits in the clean version.....tried again to post on sharepoint..... Anyway here's my version. Lauren, please check whether I captured your suggestion. – j. -

From: Michaels, Lauren <Michaels.Lauren@epa.gov>
Sent: Tuesday, February 25, 2020 5:09 PM

To: Stahle, Susan <Stahle.Susan@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>
Subject: RE: Revised action memo

I made some edits in the non-clean version (realizing now I probably should have done so in the clean version... If I have some time tomorrow I'll try and move them over!)

From: Stahle, Susan <Stahle.Susan@epa.gov>
Sent: Tuesday, February 25, 2020 4:32 PM
To: Cohen, Janet <cohen.janet@epa.gov>
Cc: Michaels, Lauren <Michaels.Lauren@epa.gov>
Subject: RE: Revised action memo

Here are the Sharepoint versions.

Susan Stahle
Air and Radiation Law Office
Office of General Counsel
U.S. Environmental Protection Agency
WJCN-7502B
202-564-1272

From: Cohen, Janet <cohen.janet@epa.gov>
Sent: Tuesday, February 25, 2020 4:24 PM
To: Stahle, Susan <Stahle.Susan@epa.gov>
Cc: Michaels, Lauren <Michaels.Lauren@epa.gov>
Subject: RE: Revised action memo

Not sure what to tell you Sue. I had tried to set up a place in the petitions/2019 directory where we could collect all the stuff related to whatever we may be doing or saying on Friday. Or whenever it happens. But that seems not to be taking. How about if you post it wherever makes sense to you and just let us know where that is. I'm looking at Karen's Ex. 4 CBI template now, once that's ready we can put it in the same place, along with Nick's table.

- J. -

From: Stahle, Susan <Stahle.Susan@epa.gov>
Sent: Tuesday, February 25, 2020 12:33 PM
To: Cohen, Janet <cohen.janet@epa.gov>
Cc: Michaels, Lauren <Michaels.Lauren@epa.gov>
Subject: RE: Revised action memo

Sure, where do you want me to put it on Sharepoint?

Susan Stahle
Air and Radiation Law Office
Office of General Counsel
U.S. Environmental Protection Agency
WJCN-7502B
202-564-1272

From: Cohen, Janet <cohen.janet@epa.gov>
Sent: Tuesday, February 25, 2020 12:27 PM
To: Stahle, Susan <Stahle.Susan@epa.gov>

Cc: Michaels, Lauren <Michaels.Lauren@epa.gov>

Subject: RE: Revised action memo

Sue – Lauren and I have a few edits to this document, which for purposes of version control we will enter once this is posted on sharepoint. Byron already sent a version to Ben that includes one word change. – j. -

From: Stahle, Susan <Stahle.Susan@epa.gov>

Sent: Tuesday, February 25, 2020 11:33 AM

To: Bunker, Byron <bunker.byron@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Caballero, Kathryn <Caballero.Kathryn@epa.gov>

Cc: Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Orlin, David <Orlin.David@epa.gov>

Subject: Revised action memo

Hi –

I'm attaching here the revised version I have been working on (clean and redline versions attached). The most substantial edits are to the background section at the beginning. I made a few minor tweaks later on.

Let me know if you have questions/comments (open to edits).

Hopefully this is the version that makes sense to share with management to get further input/direction.

Note – happy to put these on Sharepoint, or share with you a Sharepoint version (I have these in my own One Drive location right now but can move them wherever you want them).

Thanks,

Susan Stahle
Air and Radiation Law Office
Office of General Counsel
U.S. Environmental Protection Agency
WJCN-7502B
202-564-1272

Message

From: Stahle, Susan [Stahle.Susan@epa.gov]
Sent: 12/1/2020 9:00:26 PM
To: Bunker, Byron [bunker.byron@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]; Nelson, Karen [nelson.karen@epa.gov]; Michaels, Lauren [Michaels.Lauren@epa.gov]
CC: Hengst, Benjamin [Hengst.Benjamin@epa.gov]
Subject: FW: NEW LITIGATION CAA [Ex. 4 CBI] v. EPA, No. 20-3300 (7th Cir.)
Attachments: [Ex. 4 CBI] Seventh Cir pet for rev 20-3300.pdf

FYI.

Susan Stahle
 Air and Radiation Law Office
 Office of General Counsel
 U.S. Environmental Protection Agency
 WJCN-7502B
 202-564-1272

From: Stahle, Susan
Sent: Tuesday, December 1, 2020 3:57 PM
To: OGC Immediate Office MGMT <OGC_Immediate_Office_MGMT@epa.gov>; OGC Immediate Office Support <OGCFrontOfficeSupportStaff@epa.gov>
Cc: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>; Miller, Meredith <Miller.Meredith@epa.gov>
Subject: NEW LITIGATION CAA [Ex. 4 CBI] v. EPA, No. 20-3300 (7th Cir.)

On November 30, 2020, [Ex. 4 CBI] filed the attached petition for review in the Seventh Circuit Court of Appeals challenging a decision EPA issued on September 14, 2020, entitled "Denial of Small Refinery Gap-Filling Petitions." This decision included a denial of [Ex. 4 CBI] gap-filling petitions for one or more of the RFS compliance years 2011 through 2016. The decision is attached as Exhibit A to the petition for review.

Susan Stahle
 Air and Radiation Law Office
 Office of General Counsel
 U.S. Environmental Protection Agency
 WJCN-7502B
 202-564-1272

Message

From: Stahle, Susan [Stahle.Susan@epa.gov]
Sent: 12/1/2020 2:34:58 PM
To: Bunker, Byron [bunker.byron@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]; Nelson, Karen [nelson.karen@epa.gov]; Michaels, Lauren [Michaels.Lauren@epa.gov]
CC: Hengst, Benjamin [Hengst.Benjamin@epa.gov]
Subject: FW: NEW LITIGATION CAA [REDACTED] Ex. 4 CBI v. EPA, No. 20-9637 (10th Cir.)
Attachments: [REDACTED] Ex. 4 CBI Tenth Cir pet for rev 20-9637.pdf

FYI – please share further as needed.

Susan Stahle
 Air and Radiation Law Office
 Office of General Counsel
 U.S. Environmental Protection Agency
 WJCN-7502B
 202-564-1272

From: Stahle, Susan
Sent: Monday, November 30, 2020 12:50 PM
To: OGC Immediate Office MGMT <OGC_Immediate_Office_MGMT@epa.gov>; OGC Immediate Office Support <OGCFrontOfficeSupportStaff@epa.gov>
Cc: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>; Miller, Meredith <Miller.Meredith@epa.gov>
Subject: NEW LITIGATION CAA [REDACTED] Ex. 4 CBI v. EPA, No. 20-9637 (10th Cir.)

On November 27, 2020, [REDACTED] Ex. 4 CBI LLC filed the attached petition for review in the Tenth Circuit Court of Appeals challenging a decision EPA issued on September 14, 2020, entitled "Denial of Small Refinery Gap-Filling Petitions." This decision included a denial of [REDACTED] Ex. 4 CBI gap-filling petitions for one or more of the RFS compliance years 2011 through 2016. The decision is attached as Exhibit A to the petition for review.

Susan Stahle
 Air and Radiation Law Office
 Office of General Counsel
 U.S. Environmental Protection Agency
 WJCN-7502B
 202-564-1272

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

WYNNEWOOD REFINING COMPANY,
LLC,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

Case No. _____

PETITION FOR REVIEW

Pursuant to Section 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b), and Federal Rule of Appellate Procedure 15(a), Wynnewood Refining Company, LLC (“Petitioner”) petitions this Court for review of the action of the Administrator of the United States Environmental Protection Agency (“EPA”) issued on September 14, 2020 and titled “Denial of Small Refinery Gap-Filling Petitions.” This agency action purported to deny petitions submitted by Petitioner for small refinery exemptions under the Renewable Fuel Standard program for one or more of the compliance years from 2011 through 2016. A copy of the action is attached as Exhibit A.

The agency action states that, “pursuant to section 307(b) [of the Clean Air Act], any petitions for review of this final action must be filed . . . within 60 days

from the date this final action is published in the Federal Register.” Exhibit A at 5.

To Petitioner’s knowledge, however, the action has not yet been published in the Federal Register. EPA’s regulations provide:

Unless the Administrator otherwise explicitly provides in a particular promulgation, approval, or action, the time and date of such promulgation, approval or action for purposes of the second sentence of section 307(b)(1) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on (a) for a Federal Register document, the date when the document is published in the Federal Register, or (b) for any other document, two weeks after it is signed.

40 C.F.R. § 23.3. Therefore, out of an abundance of caution, Petitioner files this petition for review within the time period prescribed by 40 C.F.R. § 23.3(b) and 42 U.S.C. § 7607(b)(1).

Petitioner files this petition for review of agency action in this Court, the regional circuit in which Petitioner is located, because Petitioner believes that jurisdiction and venue are proper here pursuant to 42 U.S.C. § 7607(b)(1). As a protective measure, however, Petitioner is also filing a petition for review of the same agency action in United States Court of Appeals for the District of Columbia Circuit, because EPA stated in the agency action that “any petitions for review of this final action must be filed in the Court of Appeals for the District of Columbia Circuit.” Exhibit A at 5.

The Corporate Disclosure Statement required by Federal Rule of Appellate Procedure 26.1 and 10th Circuit Rule 26.1 is attached as Exhibit B.

Dated: November 27, 2020

Respectfully submitted,

s/ Jonathan G. Hardin


Jonathan G. Hardin
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: 202.654.6297
Facsimile: 202.654.6211
JHardin@perkinscoie.com

Attorney for Petitioner

EXHIBIT A



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SUBJECT: Denial of Small Refinery Gap-Filling Petitions  THE ADMINISTRATOR
FROM: Andrew Wheeler, Administrator of the U.S. Environmental Protection Agency
TO: Small Refineries That Have Submitted Gap-Filling Petitions for an Exemption from the Renewable Fuel Standard Program

Section 211(o)(9) of the Clean Air Act (CAA or the Act) authorizes the Administrator to temporarily exempt small refineries from their renewable fuel volume obligations under the Renewable Fuel Standard (RFS) program “for the reason of disproportionate economic hardship.” Congress created three classes of exemptions from the RFS program for “small refiner[ies],” which are defined as refineries with crude oil throughput averaging 75,000 barrels or less per day for a calendar year.¹ First, Congress granted all small refineries a blanket exemption from the RFS program until 2011.² Second, Congress directed the Department of Energy (DOE) to conduct a study³ “to determine whether compliance with the requirements of [the RFS program] would impose a disproportionate economic hardship on small refineries.”⁴ For any small refinery that DOE determined would experience disproportionate economic hardship, Congress directed EPA to “extend the exemption under clause (i) for the small refinery for a period of not less than 2 additional years.”⁵ Third, Congress provided that a small refinery “may at any time petition the Administrator for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship.”⁶ In considering such a petition, “the Administrator, in consultation with the Secretary of Energy, shall consider the findings of the [DOE] study and other economic factors.”⁷

EPA issued regulations governing small refinery exemptions (SRE) in 2010 and amended them in 2014.⁸ The 2010 regulations implemented all three classes of exemptions and defined “small refinery” the same for all three classes. EPA regarded as eligible for an exemption only those small refineries that qualified for, and thus received, the blanket statutory exemption by not

¹ CAA section 211(o)(9), (o)(1)(K); 40 C.F.R. 80.1401.

² CAA section 211(o)(9)(A)(i).

³ “Small Refinery Exemption Study, An Investigation into Disproportionate Economic Hardship,” Office of Policy and International Affairs, U.S. Department of Energy, March 2011 (DOE Small Refinery Study).

⁴ CAA section 211(o)(9)(A)(ii)(I).

⁵ CAA section 211(o)(9)(A)(ii)(II).

⁶ CAA section 211(o)(9)(B)(i).

⁷ CAA section 211(o)(9)(B)(ii); 40 C.F.R. 80.1441.

⁸ 75 Fed. Reg. 14,670 (Mar. 26, 2010); 79 Fed. Reg. 42,128 (July 18, 2014).

exceeding the 75,000-barrel-per-day crude-throughput threshold for the 2006 calendar year.⁹ In 2014, EPA amended its regulations and considered a small refinery eligible to petition for an exemption under the statute based on a small refinery's crude throughput during the desired exemption period and the year immediately preceding the petition.¹⁰ EPA was therefore considering petitions and granting exemptions based on this eligibility provision and its analysis of disproportionate economic hardship (DEH). EPA did not require a small refinery to demonstrate receipt of a continuous exemption to evaluate its petition.

As part of EPA's evaluation process, and consistent with its statutory obligation to consult DOE, EPA asks DOE to evaluate all the information EPA receives from each petitioner. DOE's expertise in evaluating economic conditions at U.S. refineries is fundamental to the process both DOE and EPA use to identify whether DEH exists for petitioning small refineries in the context of the RFS program. After evaluating the information submitted by the petitioner, DOE provides a recommendation to EPA on whether a small refinery merits an exemption from RFS obligations. As described in the DOE Small Refinery Study, DOE assesses the potential for DEH at a small refinery based on two sets of metrics. One set of metrics assesses structural and economic conditions that could disproportionately affect the refinery (collectively described as "disproportionate impacts" when referencing Section 1 and Section 2 of DOE's scoring matrix). The other set of metrics assesses the financial conditions that could cause viability concerns at the refinery (described as "viability impairment" when referencing Section 3 of DOE's scoring matrix). DOE's recommendation informs EPA's decision about whether to grant or deny an SRE petition for a small refinery.

Previously, DOE and EPA had considered that DEH exists only when a small refinery demonstrates that it experiences *both* disproportionate impacts *and* viability impairment. However, in response to concerns that the two agencies' threshold for establishing DEH was too stringent, Congress in 2016 clarified that DEH can exist if DOE finds that a small refinery is experiencing *either* disproportionate impacts *or* viability impairment, in which case Congress directed DOE to recommend a 50 percent exemption from the RFS. This was relayed in an explanatory statement accompanying the 2016 Appropriations Act that stated: "If the Secretary finds that either of these two components exists, the Secretary is directed to recommend to the EPA Administrator a 50 percent waiver of RFS requirements for the petitioner."¹¹ Congress subsequently directed EPA to follow DOE's recommendation, and to report to Congress if it did not.¹²

⁹ CAA section 211(o)(1)(K); 40 C.F.R. 80.1141(a)(1), 80.1441(a)(1).

¹⁰ CAA section 211(o)(9)(B)(i); 40 C.F.R. 80.1441(e)(2)(iii).

¹¹ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (2015). The Explanatory Statement is available at: <https://rules.house.gov/bill/114/hr-2029-sa>.

¹² Senate Report 114-281 ("When making decisions about small refinery exemptions under the RFS program, the Agency is directed to follow DOE's recommendations which are to be based on the original 2011 Small Refinery Exemption Study prepared for Congress and the conference report to division D of the Consolidated Appropriations Act of 2016. Should the Administrator disagree with a waiver recommendation from the Secretary of Energy, either to approve or deny, the Agency shall provide a report to the Committee on Appropriations and to the Secretary of

On January 24, 2020, in the *Renewable Fuels Association (RFA)* case, the Tenth Circuit Court of Appeals decided a challenge to EPA's grant of small refinery exemptions to three small refineries.¹³ The court held that EPA had exceeded its CAA statutory authority and impermissibly granted the petitions because the three refineries had not received an exemption for all prior years of the RFS program.¹⁴ According to the Court, "[b]ecause an 'extension' requires a small refinery exemption in prior years to prolong, enlarge or add to, the three refinery petitions in this case were improvidently granted. The amended Clean Air Act did not authorize the EPA to grant these petitions."¹⁵

Since March 2020, 17 small refineries in 14 states in seven federal judicial circuits have submitted 68 individual petitions asking EPA either to reconsider exemption denials (1) or grant exemptions for prior years in which the refineries had not sought them (54). It appears that these small refineries have attempted to fill their exemption extension "gaps" through the filing of these petitions. Thus, as shorthand, EPA generically calls all these petitions "gap-filling petitions" (GFPs). The majority of the GFPs were received in March 2020, although additional GFPs were received in June, August and September of 2020.

Starting in April 2020, EPA provided DOE with these GFPs spanning from RFS compliance years 2011 to 2018 to be evaluated for DEH. DOE transmitted its findings on 54 of the 68 GFPs at the end of July 2020.¹⁶ In its recommendations for those GFPs for which it provided its findings, DOE found that while most of the small refineries had demonstrated some degree of structural hardships during the years related to their petitions, none of the small refineries had demonstrated that their viability was affected. For these reasons, DOE recommended either no relief or 50 percent relief for each of the small refineries that submitted GFPs.

As an initial matter, it is not clear whether the "at any time" language in the statute also allows EPA to grant these gap-filling petitions. *See* CAA 211(o)(9)(B)(i). The statutory language certainly does not preclude EPA from considering the time that has elapsed between the compliance year and when a small refinery petitions for relief as a factor in determining whether to grant such relief. Indeed, it seems unlikely that Congress contemplated or intended to allow a small refinery to obtain hardship relief through submitting a petition in calendar year 2020 for RFS compliance year 2011, for example. Moreover, it is unclear whether EPA has authority to grant a GFP when the small refinery which submitted it already complied with its RFS obligations for that prior year. Where a refinery has successfully complied with the RFS and did not apply for hardship relief until a number of years after the purported hardship, EPA finds that it is appropriate for such refinery to clearly and convincingly demonstrate hardship, particularly

Energy that explains the Agency position. Such report shall be provided 10 days prior to issuing a decision on a waiver petition.").

¹³ *Renewable Fuels Ass'n et al. v. EPA*, 948 F.3d 1206 (10th Cir. 2020) (*RFA* decision).

¹⁴ *Id.* at 1244-1249.

¹⁵ *Id.* at 1249.

¹⁶ DOE has not provided its recommendations for the remaining 14 GFPs. This document does not address those petitions.

in light of open questions regarding the Agency's statutory authority and the availability of relief for compliance years that have long since been closed.¹⁷ EPA has not fully explored these and other difficult legal issues raised by these petitions. Regardless, assuming without deciding that these petitions are properly before the Agency, I provide my decisions on them below.

Based on DOE's recommendations, I am denying exemptions for the gap-filling petitions that seek reconsideration of prior EPA decisions because those small refineries have not provided any new information that would necessitate EPA changing its prior decisions for those RFS compliance years. DOE and EPA thoroughly and carefully evaluated the petitions for those years at that time, and EPA has found nothing in these new submissions that would merit a change in those previous decisions. These small refineries did not demonstrate then or now that they experienced disproportionate economic hardship from compliance with the RFS program and do not warrant an exemption for those RFS compliance years. EPA recognizes that some of its small refinery exemption policies may have changed between 2011 and the present. However, we do not believe it is appropriate in these cases to change our past decisions based on new policies, especially given the length of time that has passed since our original decisions, the lack of material new information supporting a different outcome, and the remedial difficulties associated with providing relief many years after compliance was already achieved.

Based on DOE's recommendations, I am denying exemptions for those gap-filling petitions where DOE recommended no relief. In these instances, EPA agrees with DOE's evaluation and recommendation that these small refineries did not demonstrate disproportionate economic hardship from compliance with the RFS program for those RFS compliance years. Several of these petitions alleging hardship date back to 2011. If such hardship was occurring in those prior RFS compliance years, these small refineries likely would have petitioned for relief in each of those preceding RFS compliance years. Instead, these small refineries consistently complied with their annual RFS obligations while continuing to participate in the refining industry. Given such circumstances, these small refineries have not demonstrated the requisite hardship to garner exemptions now for those past RFS compliance years.

I am also denying exemptions for all the gap-filling petitions where DOE recommended 50 percent relief. EPA doubts that Congress intended to exempt small refineries that already successfully complied with their RFS obligations many years past without demonstrating that they experienced disproportionate economic hardship as a result of that compliance. Despite the difficulty DOE may have identified through use of its scoring matrix, that difficulty was not enough to prevent these same small refineries from fully complying with their past annual RFS obligations and remain a commercial entity. Again, these small refineries have not demonstrated disproportionate economic hardship in 2020 for RFS compliance years 2011 through 2018 when those same refineries already successfully complied with those prior RFS obligations.

This decision is appropriate under the Act and is consistent with the case law recognizing EPA's

¹⁷ EPA also notes that it is not clearly established whether a so-called "continuous exemption" is created by EPA granting a gap-filling petition many years after the small refinery has already complied with its RFS obligation for that year.

independent authority in deciding whether to grant or deny RFS small refinery petitions.¹⁸ This decision is a nationally applicable final agency action for purposes of CAA section 307(b)(1). In the alternative, EPA finds that this final action is based on a determination of nationwide scope or effect for purposes of CAA section 307(b)(1). This decision addresses gap-filling petitions filed by 17 small refineries in 14 states and spanning seven federal judicial circuits together in a single action, applying the same analysis to similarly situated small refineries, as explained above. For this reason, this final action is nationally applicable, or, in the alternative, EPA finds that this action is based on a determination of nationwide scope or effect for purposes of section 307(b)(1). Thus, pursuant to section 307(b), any petitions for review of this final action must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date this final action is published in the Federal Register.

This action is not a rulemaking and is not subject to the various statutory and other provisions applicable to a rulemaking.

¹⁸ *Sinclair Wyoming Refining Co. v. EPA*, 874 F.3d 1159, 1166 (10th Cir. 2017); *See also Hermes Consol.*, 787 F.3d at 574-575; *Lion Oil Co. v. EPA*, 792 F.3d 978, 982-983 (8th Cir. 2015).

EXHIBIT B

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

WYNNEWOOD REFINING COMPANY,
LLC,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

Case No. _____

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 10th Circuit Rule 26.1, Petitioner Wynnewood Refining Company, LLC, provides the following corporate disclosure statement:

Wynnewood Refining Company, LLC is a wholly owned subsidiary of CVR Refining, LLC, a Delaware limited liability company. CVR Refining, LLC is a wholly owned subsidiary of CVR Refining, LP, which is an indirect wholly owned subsidiary of CVR Energy, Inc., a Delaware corporation that is publicly traded on the New York Stock Exchange under the symbol “CVI.”

Petitioner will file a revised corporate disclosure statement should it become aware of a change in corporate ownership interests that would affect the disclosures required by Rule 26.1.

Dated: November 27, 2020

Respectfully submitted,

s/ Jonathan G. Hardin

Jonathan G. Hardin
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700 Thirteenth Street, N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: 202.654.6297
Facsimile: 202.654.6211
JHardin@perkinscoie.com

Attorney for Petitioner

CERTIFICATE OF SERVICE

Pursuant to Federal Rules of Appellate Procedure 3(d), 15(c) and 25, 10th Circuit Rules 15.2 and 25.4, and 40 C.F.R. § 23.12(a), I hereby certify that on November 27, 2020, I will cause copies of the foregoing Petition for Review and Corporate Disclosure Statement to be served by certified mail, return receipt requested upon the following:

HON. ANDREW WHEELER, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

CORRESPONDENCE CONTROL UNIT
Office of General Counsel (2311)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

HON. WILLIAM BARR
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

HON. JEFFREY BOSSERT CLARK
Assistant Attorney General
Environmental and Natural Resources Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dated: November 27, 2020

s/ Jonathan G. Hardin
Jonathan G. Hardin
PERKINS COIE LLP

Message

From: Stahle, Susan [Stahle.Susan@epa.gov]
Sent: 12/1/2020 2:34:33 PM
To: Bunker, Byron [bunker.byron@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]; Nelson, Karen [nelson.karen@epa.gov]; Michaels, Lauren [Michaels.Lauren@epa.gov]
CC: Hengst, Benjamin [Hengst.Benjamin@epa.gov]
Subject: FW: NEW LITIGATION CAA [Ex. 4 CBI] v. EPA, No. 20-9636 (10th Cir.)
Attachments: [Ex. 4 CBI] Tenth Cir pet for rev 20-9636.pdf

FYI – please share further as needed.

Susan Stahle
 Air and Radiation Law Office
 Office of General Counsel
 U.S. Environmental Protection Agency
 WJCN-7502B
 202-564-1272

From: Stahle, Susan
Sent: Monday, November 30, 2020 12:53 PM
To: OGC Immediate Office MGMT <OGC_Immediate_Office_MGMT@epa.gov>; OGC Immediate Office Support <OGCFrontOfficeSupportStaff@epa.gov>
Cc: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>; Miller, Meredith <Miller.Meredith@epa.gov>
Subject: NEW LITIGATION CAA [Ex. 4 CBI] v. EPA, No. 20-9636 (10th Cir.)

On November 27, 2020, [Ex. 4 CBI] filed the attached petition for review in the Tenth Circuit Court of Appeals challenging a decision EPA issued on September 14, 2020, entitled "Denial of Small Refinery Gap-Filling Petitions." This decision included a denial of [Ex. 4 CBI] gap-filling petitions for one or more of the RFS compliance years 2011 through 2016. The decision is attached as Exhibit A to the petition for review.

Susan Stahle
 Air and Radiation Law Office
 Office of General Counsel
 U.S. Environmental Protection Agency
 WJCN-7502B
 202-564-1272

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

WYOMING REFINING COMPANY,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

Case No. _____

PETITION FOR REVIEW

Pursuant to Section 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b), and Federal Rule of Appellate Procedure 15(a), Wyoming Refining Company (“Petitioner”) petitions this Court for review of the action of the Administrator of the United States Environmental Protection Agency (“EPA”) issued on September 14, 2020 and titled “Denial of Small Refinery Gap-Filling Petitions.” This agency action purported to deny petitions submitted by Petitioner for small refinery exemptions under the Renewable Fuel Standard program for one or more of the compliance years from 2011 through 2016. A copy of the action is attached as Exhibit A.

The agency action states that, “pursuant to section 307(b) [of the Clean Air Act], any petitions for review of this final action must be filed . . . within 60 days

from the date this final action is published in the Federal Register.” Exhibit A at 5.

To Petitioner’s knowledge, however, the action has not yet been published in the Federal Register. EPA’s regulations provide:

Unless the Administrator otherwise explicitly provides in a particular promulgation, approval, or action, the time and date of such promulgation, approval or action for purposes of the second sentence of section 307(b)(1) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on (a) for a Federal Register document, the date when the document is published in the Federal Register, or (b) for any other document, two weeks after it is signed.

40 C.F.R. § 23.3. Therefore, out of an abundance of caution, Petitioner files this petition for review within the time period prescribed by 40 C.F.R. § 23.3(b) and 42 U.S.C. § 7607(b)(1).

Petitioner files this petition for review of agency action in this Court, the regional circuit in which Petitioner is located, because Petitioner believes that jurisdiction and venue are proper here pursuant to 42 U.S.C. § 7607(b)(1). As a protective measure, however, Petitioner is also filing a petition for review of the same agency action in United States Court of Appeals for the District of Columbia Circuit, because EPA stated in the agency action that “any petitions for review of this final action must be filed in the Court of Appeals for the District of Columbia Circuit.” Exhibit A at 5.

The Corporate Disclosure Statement required by Federal Rule of Appellate Procedure 26.1 and 10th Circuit Rule 26.1 is attached as Exhibit B.

Dated: November 27, 2020

Respectfully submitted,

s/ Jonathan G. Hardin


Jonathan G. Hardin
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: 202.654.6297
Facsimile: 202.654.6211
JHardin@perkinscoie.com

Attorney for Petitioner

EXHIBIT A



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SUBJECT: Denial of Small Refinery Gap-Filling Petitions  THE ADMINISTRATOR
FROM: Andrew Wheeler, Administrator of the U.S. Environmental Protection Agency
TO: Small Refineries That Have Submitted Gap-Filling Petitions for an Exemption from the Renewable Fuel Standard Program

Section 211(o)(9) of the Clean Air Act (CAA or the Act) authorizes the Administrator to temporarily exempt small refineries from their renewable fuel volume obligations under the Renewable Fuel Standard (RFS) program “for the reason of disproportionate economic hardship.” Congress created three classes of exemptions from the RFS program for “small refiner[ies],” which are defined as refineries with crude oil throughput averaging 75,000 barrels or less per day for a calendar year.¹ First, Congress granted all small refineries a blanket exemption from the RFS program until 2011.² Second, Congress directed the Department of Energy (DOE) to conduct a study³ “to determine whether compliance with the requirements of [the RFS program] would impose a disproportionate economic hardship on small refineries.”⁴ For any small refinery that DOE determined would experience disproportionate economic hardship, Congress directed EPA to “extend the exemption under clause (i) for the small refinery for a period of not less than 2 additional years.”⁵ Third, Congress provided that a small refinery “may at any time petition the Administrator for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship.”⁶ In considering such a petition, “the Administrator, in consultation with the Secretary of Energy, shall consider the findings of the [DOE] study and other economic factors.”⁷

EPA issued regulations governing small refinery exemptions (SRE) in 2010 and amended them in 2014.⁸ The 2010 regulations implemented all three classes of exemptions and defined “small refinery” the same for all three classes. EPA regarded as eligible for an exemption only those small refineries that qualified for, and thus received, the blanket statutory exemption by not

¹ CAA section 211(o)(9), (o)(1)(K); 40 C.F.R. 80.1401.

² CAA section 211(o)(9)(A)(i).

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⁴ CAA section 211(o)(9)(A)(ii)(I).

⁵ CAA section 211(o)(9)(A)(ii)(II).

⁶ CAA section 211(o)(9)(B)(i).

⁷ CAA section 211(o)(9)(B)(ii); 40 C.F.R. 80.1441.

⁸ 75 Fed. Reg. 14,670 (Mar. 26, 2010); 79 Fed. Reg. 42,128 (July 18, 2014).

exceeding the 75,000-barrel-per-day crude-throughput threshold for the 2006 calendar year.⁹ In 2014, EPA amended its regulations and considered a small refinery eligible to petition for an exemption under the statute based on a small refinery's crude throughput during the desired exemption period and the year immediately preceding the petition.¹⁰ EPA was therefore considering petitions and granting exemptions based on this eligibility provision and its analysis of disproportionate economic hardship (DEH). EPA did not require a small refinery to demonstrate receipt of a continuous exemption to evaluate its petition.

As part of EPA's evaluation process, and consistent with its statutory obligation to consult DOE, EPA asks DOE to evaluate all the information EPA receives from each petitioner. DOE's expertise in evaluating economic conditions at U.S. refineries is fundamental to the process both DOE and EPA use to identify whether DEH exists for petitioning small refineries in the context of the RFS program. After evaluating the information submitted by the petitioner, DOE provides a recommendation to EPA on whether a small refinery merits an exemption from RFS obligations. As described in the DOE Small Refinery Study, DOE assesses the potential for DEH at a small refinery based on two sets of metrics. One set of metrics assesses structural and economic conditions that could disproportionately affect the refinery (collectively described as "disproportionate impacts" when referencing Section 1 and Section 2 of DOE's scoring matrix). The other set of metrics assesses the financial conditions that could cause viability concerns at the refinery (described as "viability impairment" when referencing Section 3 of DOE's scoring matrix). DOE's recommendation informs EPA's decision about whether to grant or deny an SRE petition for a small refinery.

Previously, DOE and EPA had considered that DEH exists only when a small refinery demonstrates that it experiences *both* disproportionate impacts *and* viability impairment. However, in response to concerns that the two agencies' threshold for establishing DEH was too stringent, Congress in 2016 clarified that DEH can exist if DOE finds that a small refinery is experiencing *either* disproportionate impacts *or* viability impairment, in which case Congress directed DOE to recommend a 50 percent exemption from the RFS. This was relayed in an explanatory statement accompanying the 2016 Appropriations Act that stated: "If the Secretary finds that either of these two components exists, the Secretary is directed to recommend to the EPA Administrator a 50 percent waiver of RFS requirements for the petitioner."¹¹ Congress subsequently directed EPA to follow DOE's recommendation, and to report to Congress if it did not.¹²

⁹ CAA section 211(o)(1)(K); 40 C.F.R. 80.1141(a)(1), 80.1441(a)(1).

¹⁰ CAA section 211(o)(9)(B)(i); 40 C.F.R. 80.1441(e)(2)(iii).

¹¹ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (2015). The Explanatory Statement is available at: <https://rules.house.gov/bill/114/hr-2029-sa>.

¹² Senate Report 114-281 ("When making decisions about small refinery exemptions under the RFS program, the Agency is directed to follow DOE's recommendations which are to be based on the original 2011 Small Refinery Exemption Study prepared for Congress and the conference report to division D of the Consolidated Appropriations Act of 2016. Should the Administrator disagree with a waiver recommendation from the Secretary of Energy, either to approve or deny, the Agency shall provide a report to the Committee on Appropriations and to the Secretary of

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Since March 2020, 17 small refineries in 14 states in seven federal judicial circuits have submitted 68 individual petitions asking EPA either to reconsider exemption denials (1) or grant exemptions for prior years in which the refineries had not sought them (54). It appears that these small refineries have attempted to fill their exemption extension "gaps" through the filing of these petitions. Thus, as shorthand, EPA generically calls all these petitions "gap-filling petitions" (GFPs). The majority of the GFPs were received in March 2020, although additional GFPs were received in June, August and September of 2020.

Starting in April 2020, EPA provided DOE with these GFPs spanning from RFS compliance years 2011 to 2018 to be evaluated for DEH. DOE transmitted its findings on 54 of the 68 GFPs at the end of July 2020.¹⁶ In its recommendations for those GFPs for which it provided its findings, DOE found that while most of the small refineries had demonstrated some degree of structural hardships during the years related to their petitions, none of the small refineries had demonstrated that their viability was affected. For these reasons, DOE recommended either no relief or 50 percent relief for each of the small refineries that submitted GFPs.

As an initial matter, it is not clear whether the "at any time" language in the statute also allows EPA to grant these gap-filling petitions. *See* CAA 211(o)(9)(B)(i). The statutory language certainly does not preclude EPA from considering the time that has elapsed between the compliance year and when a small refinery petitions for relief as a factor in determining whether to grant such relief. Indeed, it seems unlikely that Congress contemplated or intended to allow a small refinery to obtain hardship relief through submitting a petition in calendar year 2020 for RFS compliance year 2011, for example. Moreover, it is unclear whether EPA has authority to grant a GFP when the small refinery which submitted it already complied with its RFS obligations for that prior year. Where a refinery has successfully complied with the RFS and did not apply for hardship relief until a number of years after the purported hardship, EPA finds that it is appropriate for such refinery to clearly and convincingly demonstrate hardship, particularly

Energy that explains the Agency position. Such report shall be provided 10 days prior to issuing a decision on a waiver petition.").

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¹⁴ *Id.* at 1244-1249.

¹⁵ *Id.* at 1249.

¹⁶ DOE has not provided its recommendations for the remaining 14 GFPs. This document does not address those petitions.

in light of open questions regarding the Agency's statutory authority and the availability of relief for compliance years that have long since been closed.¹⁷ EPA has not fully explored these and other difficult legal issues raised by these petitions. Regardless, assuming without deciding that these petitions are properly before the Agency, I provide my decisions on them below.

Based on DOE's recommendations, I am denying exemptions for the gap-filling petitions that seek reconsideration of prior EPA decisions because those small refineries have not provided any new information that would necessitate EPA changing its prior decisions for those RFS compliance years. DOE and EPA thoroughly and carefully evaluated the petitions for those years at that time, and EPA has found nothing in these new submissions that would merit a change in those previous decisions. These small refineries did not demonstrate then or now that they experienced disproportionate economic hardship from compliance with the RFS program and do not warrant an exemption for those RFS compliance years. EPA recognizes that some of its small refinery exemption policies may have changed between 2011 and the present. However, we do not believe it is appropriate in these cases to change our past decisions based on new policies, especially given the length of time that has passed since our original decisions, the lack of material new information supporting a different outcome, and the remedial difficulties associated with providing relief many years after compliance was already achieved.

Based on DOE's recommendations, I am denying exemptions for those gap-filling petitions where DOE recommended no relief. In these instances, EPA agrees with DOE's evaluation and recommendation that these small refineries did not demonstrate disproportionate economic hardship from compliance with the RFS program for those RFS compliance years. Several of these petitions alleging hardship date back to 2011. If such hardship was occurring in those prior RFS compliance years, these small refineries likely would have petitioned for relief in each of those preceding RFS compliance years. Instead, these small refineries consistently complied with their annual RFS obligations while continuing to participate in the refining industry. Given such circumstances, these small refineries have not demonstrated the requisite hardship to garner exemptions now for those past RFS compliance years.

I am also denying exemptions for all the gap-filling petitions where DOE recommended 50 percent relief. EPA doubts that Congress intended to exempt small refineries that already successfully complied with their RFS obligations many years past without demonstrating that they experienced disproportionate economic hardship as a result of that compliance. Despite the difficulty DOE may have identified through use of its scoring matrix, that difficulty was not enough to prevent these same small refineries from fully complying with their past annual RFS obligations and remain a commercial entity. Again, these small refineries have not demonstrated disproportionate economic hardship in 2020 for RFS compliance years 2011 through 2018 when those same refineries already successfully complied with those prior RFS obligations.

This decision is appropriate under the Act and is consistent with the case law recognizing EPA's

¹⁷ EPA also notes that it is not clearly established whether a so-called "continuous exemption" is created by EPA granting a gap-filling petition many years after the small refinery has already complied with its RFS obligation for that year.

independent authority in deciding whether to grant or deny RFS small refinery petitions.¹⁸ This decision is a nationally applicable final agency action for purposes of CAA section 307(b)(1). In the alternative, EPA finds that this final action is based on a determination of nationwide scope or effect for purposes of CAA section 307(b)(1). This decision addresses gap-filling petitions filed by 17 small refineries in 14 states and spanning seven federal judicial circuits together in a single action, applying the same analysis to similarly situated small refineries, as explained above. For this reason, this final action is nationally applicable, or, in the alternative, EPA finds that this action is based on a determination of nationwide scope or effect for purposes of section 307(b)(1). Thus, pursuant to section 307(b), any petitions for review of this final action must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date this final action is published in the Federal Register.

This action is not a rulemaking and is not subject to the various statutory and other provisions applicable to a rulemaking.

¹⁸ *Sinclair Wyoming Refining Co. v. EPA*, 874 F.3d 1159, 1166 (10th Cir. 2017); *See also Hermes Consol.*, 787 F.3d at 574-575; *Lion Oil Co. v. EPA*, 792 F.3d 978, 982-983 (8th Cir. 2015).

EXHIBIT B

**UNITED STATES COURT OF APPEALS
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 10th Circuit Rule 26.1, Petitioner Wyoming Refining Company provides the following corporate disclosure statement:

Wyoming Refining Company is a trade name for Hermes Consolidated, LLC, a limited liability company organized under the laws of Delaware, doing business as Wyoming Refining Company. Wyoming Refining Company is a refiner of petroleum products. Wyoming Refining Company is an indirect wholly owned subsidiary of Par Pacific Holdings, Inc., a publicly held corporation. BlackRock, Inc., pursuant to its recent 13F filing, reported that it or funds or

accounts managed by it, owns more than 10% of Par Pacific Holding's stock; no other publicly held company has a 10 percent or greater ownership interest in it.

Petitioner will file a revised corporate disclosure statement should it become aware of a change in corporate ownership interests that would affect the disclosures required by Rule 26.1.

Dated: November 27, 2020

Respectfully submitted,

s/ Jonathan G. Hardin

Jonathan G. Hardin
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 800
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JHardin@perkinscoie.com

Attorney for Petitioner

CERTIFICATE OF SERVICE

Pursuant to Federal Rules of Appellate Procedure 3(d), 15(c) and 25, 10th Circuit Rules 15.2 and 25.4, and 40 C.F.R. § 23.12(a), I hereby certify that on November 27, 2020, I will cause copies of the foregoing Petition for Review and Corporate Disclosure Statement to be served by certified mail, return receipt requested upon the following:

HON. ANDREW WHEELER, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

CORRESPONDENCE CONTROL UNIT
Office of General Counsel (2311)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

HON. WILLIAM BARR
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

HON. JEFFREY BOSSERT CLARK
Assistant Attorney General
Environmental and Natural Resources Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dated: November 27, 2020

s/ Jonathan G. Hardin
Jonathan G. Hardin
PERKINS COIE LLP

Message

From: Stahle, Susan [Stahle.Susan@epa.gov]
Sent: 12/1/2020 2:34:06 PM
To: Bunker, Byron [bunker.byron@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]; Nelson, Karen [nelson.karen@epa.gov]; Michaels, Lauren [Michaels.Lauren@epa.gov]
CC: Hengst, Benjamin [Hengst.Benjamin@epa.gov]
Subject: FW: CORRECTION - NEW LITIGATION CAA - [Ex. 4 CBI] v. EPA, No. 20-73492 (9th Cir.)
Attachments: [Ex. 4 CBI] Nin Cir pet for rev 20-73492.pdf

FYI – please share further as needed.

Susan Stahle
 Air and Radiation Law Office
 Office of General Counsel
 U.S. Environmental Protection Agency
 WJCN-7502B
 202-564-1272

From: Stahle, Susan
Sent: Monday, November 30, 2020 12:28 PM
To: OGC Immediate Office MGMT <OGC_Immediate_Office_MGMT@epa.gov>; OGC Immediate Office Support <OGCFrontOfficeSupportStaff@epa.gov>
Cc: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>; Miller, Meredith <Miller.Meredith@epa.gov>
Subject: FW: CORRECTION - NEW LITIGATION CAA - [Ex. 4 CBI] v. EPA, No. 20-73492 (9th Cir.)

Apologies – correcting the subject line, the rest of the information below is correct.

Susan Stahle
 Air and Radiation Law Office
 Office of General Counsel
 U.S. Environmental Protection Agency
 WJCN-7502B
 202-564-1272

From: Stahle, Susan
Sent: Monday, November 30, 2020 12:18 PM
To: OGC Immediate Office MGMT <OGC_Immediate_Office_MGMT@epa.gov>; OGC Immediate Office Support <OGCFrontOfficeSupportStaff@epa.gov>
Cc: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>; Miller, Meredith <Miller.Meredith@epa.gov>
Subject: NEW LITIGATION CAA - [Ex. 4 CBI] v. EPA, No. 20-73492 (9th Cir.)

On November 27, 2020, [Ex. 4 CBI] and [Ex. 4 CBI] filed the attached petition for review in the Ninth Circuit Court of Appeals challenging a decision EPA issued on September 14, 2020, entitled "Denial of Small Refinery Gap-Filling Petitions." This decision included a denial of [Ex. 4 CBI] and [Ex. 4 CBI] gap-filling petitions for one or more of the RFS compliance years 2011 through 2016. The decision is attached as Exhibit A to the petition for review.

Susan Stahle
Air and Radiation Law Office
Office of General Counsel
U.S. Environmental Protection Agency
WJCN-7502B
202-564-1272

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

PAR HAWAII REFINING, LLC; U.S. OIL &
REFINING COMPANY,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

Case No. _____

PETITION FOR REVIEW

Pursuant to Section 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b), and Federal Rule of Appellate Procedure 15(a), Par Hawaii Refining, LLC, and U.S. Oil & Refining Company (“Petitioners”) petition this Court for review of the action of the Administrator of the United States Environmental Protection Agency (“EPA”) issued on September 14, 2020 and titled “Denial of Small Refinery Gap-Filling Petitions.” This agency action purported to deny the petitions submitted by Petitioners for small refinery exemptions under the Renewable Fuel Standard program for one or more of the compliance years 2011 through 2016. A copy of the action is attached as Exhibit A.

The agency action states that, “pursuant to section 307(b) [of the Clean Air Act], any petitions for review of this final action must be filed . . . within 60 days

from the date this final action is published in the Federal Register.” Exhibit A at 5.

To Petitioners’ knowledge, however, the action has not yet been published in the Federal Register. EPA’s regulations provide:

Unless the Administrator otherwise explicitly provides in a particular promulgation, approval, or action, the time and date of such promulgation, approval or action for purposes of the second sentence of section 307(b)(1) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on (a) for a Federal Register document, the date when the document is published in the Federal Register, or (b) for any other document, two weeks after it is signed.

40 C.F.R. § 23.3. Therefore, out of an abundance of caution, Petitioners file this petition for review within the time period prescribed by 40 C.F.R. § 23.3(b) and 42 U.S.C. § 7607(b)(1).

Petitioners file this petition for review of agency action in this Court, the regional circuit in which Petitioners are located, because Petitioners believe that jurisdiction and venue are proper here pursuant to 42 U.S.C. § 7607(b)(1). As a protective measure, however, Petitioners are also filing a petition for review of the same agency action in the United States Court of Appeals for the District of Columbia Circuit, because EPA stated in the agency action that “any petitions for review of this final action must be filed in the Court of Appeals for the District of Columbia Circuit.” Exhibit A at 5.

The Corporate Disclosure Statement required by Federal Rule of Appellate Procedure 26.1 and 9th Circuit Rule 26.1 is attached as Exhibit B.

Dated: November 27, 2020

Respectfully submitted,

s/ Sopen Shah

Sopen Shah
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Jonathan G. Hardin (*admission
application pending*)
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JHardin@perkinscoie.com

Attorneys for Petitioners

EXHIBIT A



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SUBJECT: Denial of Small Refinery Gap-Filling Petitions  THE ADMINISTRATOR
FROM: Andrew Wheeler, Administrator of the U.S. Environmental Protection Agency
TO: Small Refineries That Have Submitted Gap-Filling Petitions for an Exemption from the Renewable Fuel Standard Program

Section 211(o)(9) of the Clean Air Act (CAA or the Act) authorizes the Administrator to temporarily exempt small refineries from their renewable fuel volume obligations under the Renewable Fuel Standard (RFS) program “for the reason of disproportionate economic hardship.” Congress created three classes of exemptions from the RFS program for “small refiner[ies],” which are defined as refineries with crude oil throughput averaging 75,000 barrels or less per day for a calendar year.¹ First, Congress granted all small refineries a blanket exemption from the RFS program until 2011.² Second, Congress directed the Department of Energy (DOE) to conduct a study³ “to determine whether compliance with the requirements of [the RFS program] would impose a disproportionate economic hardship on small refineries.”⁴ For any small refinery that DOE determined would experience disproportionate economic hardship, Congress directed EPA to “extend the exemption under clause (i) for the small refinery for a period of not less than 2 additional years.”⁵ Third, Congress provided that a small refinery “may at any time petition the Administrator for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship.”⁶ In considering such a petition, “the Administrator, in consultation with the Secretary of Energy, shall consider the findings of the [DOE] study and other economic factors.”⁷

EPA issued regulations governing small refinery exemptions (SRE) in 2010 and amended them in 2014.⁸ The 2010 regulations implemented all three classes of exemptions and defined “small refinery” the same for all three classes. EPA regarded as eligible for an exemption only those small refineries that qualified for, and thus received, the blanket statutory exemption by not

¹ CAA section 211(o)(9), (o)(1)(K); 40 C.F.R. 80.1401.

² CAA section 211(o)(9)(A)(i).

³ “Small Refinery Exemption Study, An Investigation into Disproportionate Economic Hardship,” Office of Policy and International Affairs, U.S. Department of Energy, March 2011 (DOE Small Refinery Study).

⁴ CAA section 211(o)(9)(A)(ii)(I).

⁵ CAA section 211(o)(9)(A)(ii)(II).

⁶ CAA section 211(o)(9)(B)(i).

⁷ CAA section 211(o)(9)(B)(ii); 40 C.F.R. 80.1441.

⁸ 75 Fed. Reg. 14,670 (Mar. 26, 2010); 79 Fed. Reg. 42,128 (July 18, 2014).

exceeding the 75,000-barrel-per-day crude-throughput threshold for the 2006 calendar year.⁹ In 2014, EPA amended its regulations and considered a small refinery eligible to petition for an exemption under the statute based on a small refinery's crude throughput during the desired exemption period and the year immediately preceding the petition.¹⁰ EPA was therefore considering petitions and granting exemptions based on this eligibility provision and its analysis of disproportionate economic hardship (DEH). EPA did not require a small refinery to demonstrate receipt of a continuous exemption to evaluate its petition.

As part of EPA's evaluation process, and consistent with its statutory obligation to consult DOE, EPA asks DOE to evaluate all the information EPA receives from each petitioner. DOE's expertise in evaluating economic conditions at U.S. refineries is fundamental to the process both DOE and EPA use to identify whether DEH exists for petitioning small refineries in the context of the RFS program. After evaluating the information submitted by the petitioner, DOE provides a recommendation to EPA on whether a small refinery merits an exemption from RFS obligations. As described in the DOE Small Refinery Study, DOE assesses the potential for DEH at a small refinery based on two sets of metrics. One set of metrics assesses structural and economic conditions that could disproportionately affect the refinery (collectively described as "disproportionate impacts" when referencing Section 1 and Section 2 of DOE's scoring matrix). The other set of metrics assesses the financial conditions that could cause viability concerns at the refinery (described as "viability impairment" when referencing Section 3 of DOE's scoring matrix). DOE's recommendation informs EPA's decision about whether to grant or deny an SRE petition for a small refinery.

Previously, DOE and EPA had considered that DEH exists only when a small refinery demonstrates that it experiences *both* disproportionate impacts *and* viability impairment. However, in response to concerns that the two agencies' threshold for establishing DEH was too stringent, Congress in 2016 clarified that DEH can exist if DOE finds that a small refinery is experiencing *either* disproportionate impacts *or* viability impairment, in which case Congress directed DOE to recommend a 50 percent exemption from the RFS. This was relayed in an explanatory statement accompanying the 2016 Appropriations Act that stated: "If the Secretary finds that either of these two components exists, the Secretary is directed to recommend to the EPA Administrator a 50 percent waiver of RFS requirements for the petitioner."¹¹ Congress subsequently directed EPA to follow DOE's recommendation, and to report to Congress if it did not.¹²

⁹ CAA section 211(o)(1)(K); 40 C.F.R. 80.1141(a)(1), 80.1441(a)(1).

¹⁰ CAA section 211(o)(9)(B)(i); 40 C.F.R. 80.1441(e)(2)(iii).

¹¹ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (2015). The Explanatory Statement is available at: <https://rules.house.gov/bill/114/hr-2029-sa>.

¹² Senate Report 114-281 ("When making decisions about small refinery exemptions under the RFS program, the Agency is directed to follow DOE's recommendations which are to be based on the original 2011 Small Refinery Exemption Study prepared for Congress and the conference report to division D of the Consolidated Appropriations Act of 2016. Should the Administrator disagree with a waiver recommendation from the Secretary of Energy, either to approve or deny, the Agency shall provide a report to the Committee on Appropriations and to the Secretary of

On January 24, 2020, in the *Renewable Fuels Association (RFA)* case, the Tenth Circuit Court of Appeals decided a challenge to EPA's grant of small refinery exemptions to three small refineries.¹³ The court held that EPA had exceeded its CAA statutory authority and impermissibly granted the petitions because the three refineries had not received an exemption for all prior years of the RFS program.¹⁴ According to the Court, "[b]ecause an 'extension' requires a small refinery exemption in prior years to prolong, enlarge or add to, the three refinery petitions in this case were improvidently granted. The amended Clean Air Act did not authorize the EPA to grant these petitions."¹⁵

Since March 2020, 17 small refineries in 14 states in seven federal judicial circuits have submitted 68 individual petitions asking EPA either to reconsider exemption denials (1) or grant exemptions for prior years in which the refineries had not sought them (54). It appears that these small refineries have attempted to fill their exemption extension "gaps" through the filing of these petitions. Thus, as shorthand, EPA generically calls all these petitions "gap-filling petitions" (GFPs). The majority of the GFPs were received in March 2020, although additional GFPs were received in June, August and September of 2020.

Starting in April 2020, EPA provided DOE with these GFPs spanning from RFS compliance years 2011 to 2018 to be evaluated for DEH. DOE transmitted its findings on 54 of the 68 GFPs at the end of July 2020.¹⁶ In its recommendations for those GFPs for which it provided its findings, DOE found that while most of the small refineries had demonstrated some degree of structural hardships during the years related to their petitions, none of the small refineries had demonstrated that their viability was affected. For these reasons, DOE recommended either no relief or 50 percent relief for each of the small refineries that submitted GFPs.

As an initial matter, it is not clear whether the "at any time" language in the statute also allows EPA to grant these gap-filling petitions. *See* CAA 211(o)(9)(B)(i). The statutory language certainly does not preclude EPA from considering the time that has elapsed between the compliance year and when a small refinery petitions for relief as a factor in determining whether to grant such relief. Indeed, it seems unlikely that Congress contemplated or intended to allow a small refinery to obtain hardship relief through submitting a petition in calendar year 2020 for RFS compliance year 2011, for example. Moreover, it is unclear whether EPA has authority to grant a GFP when the small refinery which submitted it already complied with its RFS obligations for that prior year. Where a refinery has successfully complied with the RFS and did not apply for hardship relief until a number of years after the purported hardship, EPA finds that it is appropriate for such refinery to clearly and convincingly demonstrate hardship, particularly

Energy that explains the Agency position. Such report shall be provided 10 days prior to issuing a decision on a waiver petition.").

¹³ *Renewable Fuels Ass'n et al. v. EPA*, 948 F.3d 1206 (10th Cir. 2020) (*RFA* decision).

¹⁴ *Id.* at 1244-1249.

¹⁵ *Id.* at 1249.

¹⁶ DOE has not provided its recommendations for the remaining 14 GFPs. This document does not address those petitions.

in light of open questions regarding the Agency's statutory authority and the availability of relief for compliance years that have long since been closed.¹⁷ EPA has not fully explored these and other difficult legal issues raised by these petitions. Regardless, assuming without deciding that these petitions are properly before the Agency, I provide my decisions on them below.

Based on DOE's recommendations, I am denying exemptions for the gap-filling petitions that seek reconsideration of prior EPA decisions because those small refineries have not provided any new information that would necessitate EPA changing its prior decisions for those RFS compliance years. DOE and EPA thoroughly and carefully evaluated the petitions for those years at that time, and EPA has found nothing in these new submissions that would merit a change in those previous decisions. These small refineries did not demonstrate then or now that they experienced disproportionate economic hardship from compliance with the RFS program and do not warrant an exemption for those RFS compliance years. EPA recognizes that some of its small refinery exemption policies may have changed between 2011 and the present. However, we do not believe it is appropriate in these cases to change our past decisions based on new policies, especially given the length of time that has passed since our original decisions, the lack of material new information supporting a different outcome, and the remedial difficulties associated with providing relief many years after compliance was already achieved.

Based on DOE's recommendations, I am denying exemptions for those gap-filling petitions where DOE recommended no relief. In these instances, EPA agrees with DOE's evaluation and recommendation that these small refineries did not demonstrate disproportionate economic hardship from compliance with the RFS program for those RFS compliance years. Several of these petitions alleging hardship date back to 2011. If such hardship was occurring in those prior RFS compliance years, these small refineries likely would have petitioned for relief in each of those preceding RFS compliance years. Instead, these small refineries consistently complied with their annual RFS obligations while continuing to participate in the refining industry. Given such circumstances, these small refineries have not demonstrated the requisite hardship to garner exemptions now for those past RFS compliance years.

I am also denying exemptions for all the gap-filling petitions where DOE recommended 50 percent relief. EPA doubts that Congress intended to exempt small refineries that already successfully complied with their RFS obligations many years past without demonstrating that they experienced disproportionate economic hardship as a result of that compliance. Despite the difficulty DOE may have identified through use of its scoring matrix, that difficulty was not enough to prevent these same small refineries from fully complying with their past annual RFS obligations and remain a commercial entity. Again, these small refineries have not demonstrated disproportionate economic hardship in 2020 for RFS compliance years 2011 through 2018 when those same refineries already successfully complied with those prior RFS obligations.

This decision is appropriate under the Act and is consistent with the case law recognizing EPA's

¹⁷ EPA also notes that it is not clearly established whether a so-called "continuous exemption" is created by EPA granting a gap-filling petition many years after the small refinery has already complied with its RFS obligation for that year.

independent authority in deciding whether to grant or deny RFS small refinery petitions.¹⁸ This decision is a nationally applicable final agency action for purposes of CAA section 307(b)(1). In the alternative, EPA finds that this final action is based on a determination of nationwide scope or effect for purposes of CAA section 307(b)(1). This decision addresses gap-filling petitions filed by 17 small refineries in 14 states and spanning seven federal judicial circuits together in a single action, applying the same analysis to similarly situated small refineries, as explained above. For this reason, this final action is nationally applicable, or, in the alternative, EPA finds that this action is based on a determination of nationwide scope or effect for purposes of section 307(b)(1). Thus, pursuant to section 307(b), any petitions for review of this final action must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date this final action is published in the Federal Register.

This action is not a rulemaking and is not subject to the various statutory and other provisions applicable to a rulemaking.

¹⁸ *Sinclair Wyoming Refining Co. v. EPA*, 874 F.3d 1159, 1166 (10th Cir. 2017); *See also Hermes Consol.*, 787 F.3d at 574-575; *Lion Oil Co. v. EPA*, 792 F.3d 978, 982-983 (8th Cir. 2015).

EXHIBIT B

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

PAR HAWAII REFINING, LLC; U.S. OIL &
REFINING COMPANY,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

Case No. _____

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 9th Circuit Rule 26.1, Petitioners Par Hawaii Refining, LLC, and U.S. Oil & Refining Company provide the following corporate disclosure statement:

Par Hawaii Refining, LLC is a limited liability company organized under the laws of Delaware. Par Hawaii Refining, LLC, is a refiner of petroleum products. Par Hawaii Refining, LLC, is an indirect wholly owned subsidiary of Par Pacific Holdings, Inc., a publicly traded corporation. BlackRock, Inc., pursuant to its recent 13F filing, reported that it or funds or accounts managed by

it, owns more than 10% of Par Pacific Holding's stock; no other publicly held company has a 10 percent or greater ownership interest in it.

U.S. Oil & Refining Co. is incorporated under the laws of Delaware. U.S. Oil & Refining Co. is a refiner of petroleum products. U.S. Oil & Refining Co. is an indirect wholly owned subsidiary of Par Pacific Holdings, Inc., a publicly held corporation. BlackRock, Inc., pursuant to its recent 13F filing, reported that it or funds or accounts managed by it, owns more than 10% of Par Pacific Holding's stock; no other publicly held company has a 10 percent or greater ownership interest in it.

Petitioners will file a revised corporate disclosure statement should they become aware of a change in corporate ownership interests that would affect the disclosures required by Rule 26.1.

Dated: November 27, 2020

Respectfully submitted,

s/ Sopen Shah

Sopen Shah
PERKINS COIE LLP
33 East Main Street, Suite 201
Madison, WI 53703-3095
Telephone: 608.663.7480
Facsimile: 608.663.7499
SShah@perkinscoie.com

Jonathan G. Hardin (*admission
application pending*)
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: 202.654.6297
Facsimile: 202.654.6211
JHardin@perkinscoie.com

Attorneys for Petitioners

CERTIFICATE OF SERVICE

Pursuant to Federal Rules of Appellate Procedure 3(d), 15(c) and 25, 9th Circuit Rule 25, and 40 C.F.R. § 23.12(a), I hereby certify that on November 27, 2020, I will cause copies of the foregoing Petition for Review and Corporate Disclosure Statement to be served by certified mail, return receipt requested upon the following:

HON. ANDREW WHEELER, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

CORRESPONDENCE CONTROL UNIT
Office of General Counsel (2311)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

HON. WILLIAM BARR
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

HON. JEFFREY BOSSERT CLARK
Assistant Attorney General
Environmental and Natural Resources Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dated: November 27, 2020

s/ Sopen Shah
Sopen Shah
PERKINS COIE LLP

Message

From: Stahle, Susan [Stahle.Susan@epa.gov]
Sent: 12/1/2020 2:33:39 PM
To: Bunker, Byron [bunker.byron@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]; Nelson, Karen [nelson.karen@epa.gov]; Michaels, Lauren [Michaels.Lauren@epa.gov]
CC: Hengst, Benjamin [Hengst.Benjamin@epa.gov]
Subject: FW: NEW LITIGATION CAA - [Ex. 4 CBI] v. EPA, No. 20-61116 (9th Cir.)
Attachments: [Ex. 4 CBI] Ninth Cir pet for rev 20-61116.pdf

FYI – please share further as needed.

Susan Stahle
 Air and Radiation Law Office
 Office of General Counsel
 U.S. Environmental Protection Agency
 WJCN-7502B
 202-564-1272

From: Stahle, Susan
Sent: Monday, November 30, 2020 12:13 PM
To: OGC Immediate Office MGMT <OGC_Immediate_Office_MGMT@epa.gov>; OGC Immediate Office Support <OGCFrontOfficeSupportStaff@epa.gov>
Cc: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>; Miller, Meredith <Miller.Meredith@epa.gov>
Subject: NEW LITIGATION CAA - [Ex. 4 CBI] v. EPA, No. 20-61116 (9th Cir.)

On November 27, 2020, [Ex. 4 CBI] filed the attached petition for review in the Ninth Circuit Court of Appeals challenging a decision EPA issued on September 14, 2020, entitled "Denial of Small Refinery Gap-Filling Petitions." This decision included a denial of [Ex. 4 CBI] gap-filling petitions for one or more of the RFS compliance years 2011 through 2016. The decision is attached as Exhibit A to the petition for review.

Susan Stahle
 Air and Radiation Law Office
 Office of General Counsel
 U.S. Environmental Protection Agency
 WJCN-7502B
 202-564-1272

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

CALUMET SHREVEPORT REFINING,
LLC,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

Case No. _____

PETITION FOR REVIEW

Pursuant to Section 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b), and Federal Rule of Appellate Procedure 15(a), Calumet Shreveport Refining, LLC (“Petitioner”) petitions this Court for review of the action of the Administrator of the United States Environmental Protection Agency (“EPA”) issued on September 14, 2020 and titled “Denial of Small Refinery Gap-Filling Petitions.” This agency action purported to deny the petitions submitted by Petitioner for small refinery exemptions under the Renewable Fuel Standard program for one or more of the compliance years 2011 through 2016. A copy of the action is attached as Exhibit A.

The agency action states that, “pursuant to section 307(b) [of the Clean Air Act], any petitions for review of this final action must be filed . . . within 60 days

from the date this final action is published in the Federal Register.” Exhibit A at 5.

To Petitioner’s knowledge, however, the action has not yet been published in the Federal Register. EPA’s regulations provide:

Unless the Administrator otherwise explicitly provides in a particular promulgation, approval, or action, the time and date of such promulgation, approval or action for purposes of the second sentence of section 307(b)(1) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on (a) for a Federal Register document, the date when the document is published in the Federal Register, or (b) for any other document, two weeks after it is signed.

40 C.F.R. § 23.3. Therefore, out of an abundance of caution, Petitioner files this petition for review within the time period prescribed by 40 C.F.R. § 23.3(b) and 42 U.S.C. § 7607(b)(1).

Petitioner files this petition for review of agency action in this Court, the regional circuit in which Petitioner is located, because Petitioner believes that jurisdiction and venue are proper here pursuant to 42 U.S.C. § 7607(b)(1). As a protective measure, however, Petitioner is also filing a petition for review of the same agency action in the United States Court of Appeals for the District of Columbia Circuit, because EPA stated in the agency action that “any petitions for review of this final action must be filed in the Court of Appeals for the District of Columbia Circuit.” Exhibit A at 5.

The Certificate of Interested Persons required by Federal Rule of Appellate Procedure 26.1 and 5th Circuit Rule 26.1.1 is attached as Exhibit B.

Dated: November 27, 2020

Respectfully submitted,

s/ Eric B. Wolff

Eric B. Wolff
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application pending*)
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Facsimile: 202.654.6211
JHardin@perkinscoie.com

Attorneys for Petitioner

EXHIBIT A



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SUBJECT: Denial of Small Refinery Gap-Filling Petitions  THE ADMINISTRATOR
FROM: Andrew Wheeler, Administrator of the U.S. Environmental Protection Agency
TO: Small Refineries That Have Submitted Gap-Filling Petitions for an Exemption from the Renewable Fuel Standard Program

Section 211(o)(9) of the Clean Air Act (CAA or the Act) authorizes the Administrator to temporarily exempt small refineries from their renewable fuel volume obligations under the Renewable Fuel Standard (RFS) program “for the reason of disproportionate economic hardship.” Congress created three classes of exemptions from the RFS program for “small refiner[ies],” which are defined as refineries with crude oil throughput averaging 75,000 barrels or less per day for a calendar year.¹ First, Congress granted all small refineries a blanket exemption from the RFS program until 2011.² Second, Congress directed the Department of Energy (DOE) to conduct a study³ “to determine whether compliance with the requirements of [the RFS program] would impose a disproportionate economic hardship on small refineries.”⁴ For any small refinery that DOE determined would experience disproportionate economic hardship, Congress directed EPA to “extend the exemption under clause (i) for the small refinery for a period of not less than 2 additional years.”⁵ Third, Congress provided that a small refinery “may at any time petition the Administrator for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship.”⁶ In considering such a petition, “the Administrator, in consultation with the Secretary of Energy, shall consider the findings of the [DOE] study and other economic factors.”⁷

EPA issued regulations governing small refinery exemptions (SRE) in 2010 and amended them in 2014.⁸ The 2010 regulations implemented all three classes of exemptions and defined “small refinery” the same for all three classes. EPA regarded as eligible for an exemption only those small refineries that qualified for, and thus received, the blanket statutory exemption by not

¹ CAA section 211(o)(9), (o)(1)(K); 40 C.F.R. 80.1401.

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³ “Small Refinery Exemption Study, An Investigation into Disproportionate Economic Hardship,” Office of Policy and International Affairs, U.S. Department of Energy, March 2011 (DOE Small Refinery Study).

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⁸ 75 Fed. Reg. 14,670 (Mar. 26, 2010); 79 Fed. Reg. 42,128 (July 18, 2014).

exceeding the 75,000-barrel-per-day crude-throughput threshold for the 2006 calendar year.⁹ In 2014, EPA amended its regulations and considered a small refinery eligible to petition for an exemption under the statute based on a small refinery's crude throughput during the desired exemption period and the year immediately preceding the petition.¹⁰ EPA was therefore considering petitions and granting exemptions based on this eligibility provision and its analysis of disproportionate economic hardship (DEH). EPA did not require a small refinery to demonstrate receipt of a continuous exemption to evaluate its petition.

As part of EPA's evaluation process, and consistent with its statutory obligation to consult DOE, EPA asks DOE to evaluate all the information EPA receives from each petitioner. DOE's expertise in evaluating economic conditions at U.S. refineries is fundamental to the process both DOE and EPA use to identify whether DEH exists for petitioning small refineries in the context of the RFS program. After evaluating the information submitted by the petitioner, DOE provides a recommendation to EPA on whether a small refinery merits an exemption from RFS obligations. As described in the DOE Small Refinery Study, DOE assesses the potential for DEH at a small refinery based on two sets of metrics. One set of metrics assesses structural and economic conditions that could disproportionately affect the refinery (collectively described as "disproportionate impacts" when referencing Section 1 and Section 2 of DOE's scoring matrix). The other set of metrics assesses the financial conditions that could cause viability concerns at the refinery (described as "viability impairment" when referencing Section 3 of DOE's scoring matrix). DOE's recommendation informs EPA's decision about whether to grant or deny an SRE petition for a small refinery.

Previously, DOE and EPA had considered that DEH exists only when a small refinery demonstrates that it experiences *both* disproportionate impacts *and* viability impairment. However, in response to concerns that the two agencies' threshold for establishing DEH was too stringent, Congress in 2016 clarified that DEH can exist if DOE finds that a small refinery is experiencing *either* disproportionate impacts *or* viability impairment, in which case Congress directed DOE to recommend a 50 percent exemption from the RFS. This was relayed in an explanatory statement accompanying the 2016 Appropriations Act that stated: "If the Secretary finds that either of these two components exists, the Secretary is directed to recommend to the EPA Administrator a 50 percent waiver of RFS requirements for the petitioner."¹¹ Congress subsequently directed EPA to follow DOE's recommendation, and to report to Congress if it did not.¹²

⁹ CAA section 211(o)(1)(K); 40 C.F.R. 80.1141(a)(1), 80.1441(a)(1).

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¹¹ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (2015). The Explanatory Statement is available at: <https://rules.house.gov/bill/114/hr-2029-sa>.

¹² Senate Report 114-281 ("When making decisions about small refinery exemptions under the RFS program, the Agency is directed to follow DOE's recommendations which are to be based on the original 2011 Small Refinery Exemption Study prepared for Congress and the conference report to division D of the Consolidated Appropriations Act of 2016. Should the Administrator disagree with a waiver recommendation from the Secretary of Energy, either to approve or deny, the Agency shall provide a report to the Committee on Appropriations and to the Secretary of

On January 24, 2020, in the *Renewable Fuels Association (RFA)* case, the Tenth Circuit Court of Appeals decided a challenge to EPA's grant of small refinery exemptions to three small refineries.¹³ The court held that EPA had exceeded its CAA statutory authority and impermissibly granted the petitions because the three refineries had not received an exemption for all prior years of the RFS program.¹⁴ According to the Court, "[b]ecause an 'extension' requires a small refinery exemption in prior years to prolong, enlarge or add to, the three refinery petitions in this case were improvidently granted. The amended Clean Air Act did not authorize the EPA to grant these petitions."¹⁵

Since March 2020, 17 small refineries in 14 states in seven federal judicial circuits have submitted 68 individual petitions asking EPA either to reconsider exemption denials (1) or grant exemptions for prior years in which the refineries had not sought them (54). It appears that these small refineries have attempted to fill their exemption extension "gaps" through the filing of these petitions. Thus, as shorthand, EPA generically calls all these petitions "gap-filling petitions" (GFPs). The majority of the GFPs were received in March 2020, although additional GFPs were received in June, August and September of 2020.

Starting in April 2020, EPA provided DOE with these GFPs spanning from RFS compliance years 2011 to 2018 to be evaluated for DEH. DOE transmitted its findings on 54 of the 68 GFPs at the end of July 2020.¹⁶ In its recommendations for those GFPs for which it provided its findings, DOE found that while most of the small refineries had demonstrated some degree of structural hardships during the years related to their petitions, none of the small refineries had demonstrated that their viability was affected. For these reasons, DOE recommended either no relief or 50 percent relief for each of the small refineries that submitted GFPs.

As an initial matter, it is not clear whether the "at any time" language in the statute also allows EPA to grant these gap-filling petitions. *See* CAA 211(o)(9)(B)(i). The statutory language certainly does not preclude EPA from considering the time that has elapsed between the compliance year and when a small refinery petitions for relief as a factor in determining whether to grant such relief. Indeed, it seems unlikely that Congress contemplated or intended to allow a small refinery to obtain hardship relief through submitting a petition in calendar year 2020 for RFS compliance year 2011, for example. Moreover, it is unclear whether EPA has authority to grant a GFP when the small refinery which submitted it already complied with its RFS obligations for that prior year. Where a refinery has successfully complied with the RFS and did not apply for hardship relief until a number of years after the purported hardship, EPA finds that it is appropriate for such refinery to clearly and convincingly demonstrate hardship, particularly

Energy that explains the Agency position. Such report shall be provided 10 days prior to issuing a decision on a waiver petition.").

¹³ *Renewable Fuels Ass'n et al. v. EPA*, 948 F.3d 1206 (10th Cir. 2020) (*RFA* decision).

¹⁴ *Id.* at 1244-1249.

¹⁵ *Id.* at 1249.

¹⁶ DOE has not provided its recommendations for the remaining 14 GFPs. This document does not address those petitions.

in light of open questions regarding the Agency's statutory authority and the availability of relief for compliance years that have long since been closed.¹⁷ EPA has not fully explored these and other difficult legal issues raised by these petitions. Regardless, assuming without deciding that these petitions are properly before the Agency, I provide my decisions on them below.

Based on DOE's recommendations, I am denying exemptions for the gap-filling petitions that seek reconsideration of prior EPA decisions because those small refineries have not provided any new information that would necessitate EPA changing its prior decisions for those RFS compliance years. DOE and EPA thoroughly and carefully evaluated the petitions for those years at that time, and EPA has found nothing in these new submissions that would merit a change in those previous decisions. These small refineries did not demonstrate then or now that they experienced disproportionate economic hardship from compliance with the RFS program and do not warrant an exemption for those RFS compliance years. EPA recognizes that some of its small refinery exemption policies may have changed between 2011 and the present. However, we do not believe it is appropriate in these cases to change our past decisions based on new policies, especially given the length of time that has passed since our original decisions, the lack of material new information supporting a different outcome, and the remedial difficulties associated with providing relief many years after compliance was already achieved.

Based on DOE's recommendations, I am denying exemptions for those gap-filling petitions where DOE recommended no relief. In these instances, EPA agrees with DOE's evaluation and recommendation that these small refineries did not demonstrate disproportionate economic hardship from compliance with the RFS program for those RFS compliance years. Several of these petitions alleging hardship date back to 2011. If such hardship was occurring in those prior RFS compliance years, these small refineries likely would have petitioned for relief in each of those preceding RFS compliance years. Instead, these small refineries consistently complied with their annual RFS obligations while continuing to participate in the refining industry. Given such circumstances, these small refineries have not demonstrated the requisite hardship to garner exemptions now for those past RFS compliance years.

I am also denying exemptions for all the gap-filling petitions where DOE recommended 50 percent relief. EPA doubts that Congress intended to exempt small refineries that already successfully complied with their RFS obligations many years past without demonstrating that they experienced disproportionate economic hardship as a result of that compliance. Despite the difficulty DOE may have identified through use of its scoring matrix, that difficulty was not enough to prevent these same small refineries from fully complying with their past annual RFS obligations and remain a commercial entity. Again, these small refineries have not demonstrated disproportionate economic hardship in 2020 for RFS compliance years 2011 through 2018 when those same refineries already successfully complied with those prior RFS obligations.

This decision is appropriate under the Act and is consistent with the case law recognizing EPA's

¹⁷ EPA also notes that it is not clearly established whether a so-called "continuous exemption" is created by EPA granting a gap-filling petition many years after the small refinery has already complied with its RFS obligation for that year.

independent authority in deciding whether to grant or deny RFS small refinery petitions.¹⁸ This decision is a nationally applicable final agency action for purposes of CAA section 307(b)(1). In the alternative, EPA finds that this final action is based on a determination of nationwide scope or effect for purposes of CAA section 307(b)(1). This decision addresses gap-filling petitions filed by 17 small refineries in 14 states and spanning seven federal judicial circuits together in a single action, applying the same analysis to similarly situated small refineries, as explained above. For this reason, this final action is nationally applicable, or, in the alternative, EPA finds that this action is based on a determination of nationwide scope or effect for purposes of section 307(b)(1). Thus, pursuant to section 307(b), any petitions for review of this final action must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date this final action is published in the Federal Register.

This action is not a rulemaking and is not subject to the various statutory and other provisions applicable to a rulemaking.

¹⁸ *Sinclair Wyoming Refining Co. v. EPA*, 874 F.3d 1159, 1166 (10th Cir. 2017); *See also Hermes Consol.*, 787 F.3d at 574-575; *Lion Oil Co. v. EPA*, 792 F.3d 978, 982-983 (8th Cir. 2015).

EXHIBIT B

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

CALUMET SHREVEPORT REFINING,
LLC,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

Case No. _____

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and 5th Circuit Rule 26.1.1, Petitioner Calumet Shreveport Refining, LLC, provides the following certificate of interested persons:

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Calumet Shreveport Refining, LLC, incorporated under the laws of Delaware, is owned 100 percent by Calumet Specialty Products Partners, L.P.

Calumet Specialty Products Partners, L.P., incorporated under the laws of Delaware is a refiner of petroleum products. Calumet Specialty Products Partners,

L.P. has no parent company, and no publicly held company has a 10 percent or greater ownership interest in it.

Petitioner will file a revised certificate of interested persons should it become aware of a change in corporate ownership interests that would affect the disclosures required by Rule 26.1.

Dated: November 27, 2020

Respectfully submitted,

s/ Eric B. Wolff

Eric B. Wolff
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 89101-3099
Telephone: 206.359.3779
Facsimile: 206.359.9000
EWolff@perkinscoie.com

Jonathan G. Hardin (*admission
application pending*)
PERKINS COIE LLP
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Washington, D.C. 20005-3960
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Facsimile: 202.654.6211
JHardin@perkinscoie.com

Attorneys for Petitioner

CERTIFICATE OF SERVICE

Pursuant to Federal Rules of Appellate Procedure 3(d), 15(c) and 25, 5th Circuit Rule 25, and 40 C.F.R. § 23.12(a), I hereby certify that on November 27, 2020, I will cause copies of the foregoing Petition for Review and Certificate of Interested Persons to be served by certified mail, return receipt requested upon the following:

HON. ANDREW WHEELER, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

CORRESPONDENCE CONTROL UNIT
Office of General Counsel (2311)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

HON. WILLIAM BARR
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

HON. JEFFREY BOSSERT CLARK
Assistant Attorney General
Environmental and Natural Resources Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dated: November 27, 2020

s/ Eric B. Wolff
Eric B. Wolff
PERKINS COIE LLP

Message

From: Stahle, Susan [Stahle.Susan@epa.gov]
Sent: 12/1/2020 2:33:12 PM
To: Bunker, Byron [bunker.byron@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]; Nelson, Karen [nelson.karen@epa.gov]; Michaels, Lauren [Michaels.Lauren@epa.gov]
CC: Hengst, Benjamin [Hengst.Benjamin@epa.gov]
Subject: FW: NEW LITIGATION CAA [Ex. 4 CBI]. EPA, No. 20-73494 (9th Cir.)
Attachments: [Ex. 4 CBI] Ninth Cir petition for review 20-73494.pdf

FYI – please share further as needed.

Susan Stahle
 Air and Radiation Law Office
 Office of General Counsel
 U.S. Environmental Protection Agency
 WJCN-7502B
 202-564-1272

From: Stahle, Susan
Sent: Monday, November 30, 2020 12:09 PM
To: OGC Immediate Office MGMT <OGC_Immediate_Office_MGMT@epa.gov>; OGC Immediate Office Support <OGCFrontOfficeSupportStaff@epa.gov>
Cc: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>; Miller, Meredith <Miller.Meredith@epa.gov>
Subject: NEW LITIGATION CAA [Ex. 4 CBI] v. EPA, No. 20-73494 (9th Cir.)

On November 27, 2020, [Ex. 4 CBI] filed the attached petition for review in the Ninth Circuit Court of Appeals challenging a decision EPA issued on September 14, 2020, entitled "Denial of Small Refinery Gap-Filling Petitions." This decision included a denial of [Ex. 4 CBI] gap-filling petitions for one or more of the RFS compliance years 2011 through 2016. The decision is attached as Exhibit A to the petition for review.

Susan Stahle
 Air and Radiation Law Office
 Office of General Counsel
 U.S. Environmental Protection Agency
 WJCN-7502B
 202-564-1272

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CALUMET MONTANA REFINING, LLC,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

Case No. _____

PETITION FOR REVIEW

Pursuant to Section 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b), and Federal Rule of Appellate Procedure 15(a), Calumet Montana Refining, LLC (“Petitioner”) petitions this Court for review of the action of the Administrator of the United States Environmental Protection Agency (“EPA”) issued on September 14, 2020 and titled “Denial of Small Refinery Gap-Filling Petitions.” This agency action purported to deny the petitions submitted by Petitioner for small refinery exemptions under the Renewable Fuel Standard program for one or more of the compliance years 2011 through 2016. A copy of the action is attached as Exhibit A.

The agency action states that, “pursuant to section 307(b) [of the Clean Air Act], any petitions for review of this final action must be filed . . . within 60 days

from the date this final action is published in the Federal Register.” Exhibit A at 5.

To Petitioner’s knowledge, however, the action has not yet been published in the Federal Register. EPA’s regulations provide:

Unless the Administrator otherwise explicitly provides in a particular promulgation, approval, or action, the time and date of such promulgation, approval or action for purposes of the second sentence of section 307(b)(1) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on (a) for a Federal Register document, the date when the document is published in the Federal Register, or (b) for any other document, two weeks after it is signed.

40 C.F.R. § 23.3. Therefore, out of an abundance of caution, Petitioner files this petition for review within the time period prescribed by 40 C.F.R. § 23.3(b) and 42 U.S.C. § 7607(b)(1).

Petitioner files this petition for review of agency action in this Court, the regional circuit in which Petitioner is located, because Petitioner believes that jurisdiction and venue are proper here pursuant to 42 U.S.C. § 7607(b)(1). As a protective measure, however, Petitioner is also filing a petition for review of the same agency action in the United States Court of Appeals for the District of Columbia Circuit, because EPA stated in the agency action that “any petitions for review of this final action must be filed in the Court of Appeals for the District of Columbia Circuit.” Exhibit A at 5.

The Corporate Disclosure Statement required by Federal Rule of Appellate Procedure 26.1 and 9th Circuit Rule 26.1 is attached as Exhibit B.

Dated: November 27, 2020

Respectfully submitted,

s/ Sopen Shah

Sopen Shah
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33 East Main Street, Suite 201
Madison, WI 53703-3095
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Facsimile: 608.663.7499
SShah@perkinscoie.com


Jonathan G. Hardin (*admission
application pending*)
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Washington, D.C. 20005-3960
Telephone: 202.654.6297
Facsimile: 202.654.6211
JHardin@perkinscoie.com

Attorneys for Petitioner

EXHIBIT A



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SUBJECT: Denial of Small Refinery Gap-Filling Petitions  THE ADMINISTRATOR
FROM: Andrew Wheeler, Administrator of the U.S. Environmental Protection Agency
TO: Small Refineries That Have Submitted Gap-Filling Petitions for an Exemption from the Renewable Fuel Standard Program

Section 211(o)(9) of the Clean Air Act (CAA or the Act) authorizes the Administrator to temporarily exempt small refineries from their renewable fuel volume obligations under the Renewable Fuel Standard (RFS) program “for the reason of disproportionate economic hardship.” Congress created three classes of exemptions from the RFS program for “small refiner[ies],” which are defined as refineries with crude oil throughput averaging 75,000 barrels or less per day for a calendar year.¹ First, Congress granted all small refineries a blanket exemption from the RFS program until 2011.² Second, Congress directed the Department of Energy (DOE) to conduct a study³ “to determine whether compliance with the requirements of [the RFS program] would impose a disproportionate economic hardship on small refineries.”⁴ For any small refinery that DOE determined would experience disproportionate economic hardship, Congress directed EPA to “extend the exemption under clause (i) for the small refinery for a period of not less than 2 additional years.”⁵ Third, Congress provided that a small refinery “may at any time petition the Administrator for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship.”⁶ In considering such a petition, “the Administrator, in consultation with the Secretary of Energy, shall consider the findings of the [DOE] study and other economic factors.”⁷

EPA issued regulations governing small refinery exemptions (SRE) in 2010 and amended them in 2014.⁸ The 2010 regulations implemented all three classes of exemptions and defined “small refinery” the same for all three classes. EPA regarded as eligible for an exemption only those small refineries that qualified for, and thus received, the blanket statutory exemption by not

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exceeding the 75,000-barrel-per-day crude-throughput threshold for the 2006 calendar year.⁹ In 2014, EPA amended its regulations and considered a small refinery eligible to petition for an exemption under the statute based on a small refinery's crude throughput during the desired exemption period and the year immediately preceding the petition.¹⁰ EPA was therefore considering petitions and granting exemptions based on this eligibility provision and its analysis of disproportionate economic hardship (DEH). EPA did not require a small refinery to demonstrate receipt of a continuous exemption to evaluate its petition.

As part of EPA's evaluation process, and consistent with its statutory obligation to consult DOE, EPA asks DOE to evaluate all the information EPA receives from each petitioner. DOE's expertise in evaluating economic conditions at U.S. refineries is fundamental to the process both DOE and EPA use to identify whether DEH exists for petitioning small refineries in the context of the RFS program. After evaluating the information submitted by the petitioner, DOE provides a recommendation to EPA on whether a small refinery merits an exemption from RFS obligations. As described in the DOE Small Refinery Study, DOE assesses the potential for DEH at a small refinery based on two sets of metrics. One set of metrics assesses structural and economic conditions that could disproportionately affect the refinery (collectively described as "disproportionate impacts" when referencing Section 1 and Section 2 of DOE's scoring matrix). The other set of metrics assesses the financial conditions that could cause viability concerns at the refinery (described as "viability impairment" when referencing Section 3 of DOE's scoring matrix). DOE's recommendation informs EPA's decision about whether to grant or deny an SRE petition for a small refinery.

Previously, DOE and EPA had considered that DEH exists only when a small refinery demonstrates that it experiences *both* disproportionate impacts *and* viability impairment. However, in response to concerns that the two agencies' threshold for establishing DEH was too stringent, Congress in 2016 clarified that DEH can exist if DOE finds that a small refinery is experiencing *either* disproportionate impacts *or* viability impairment, in which case Congress directed DOE to recommend a 50 percent exemption from the RFS. This was relayed in an explanatory statement accompanying the 2016 Appropriations Act that stated: "If the Secretary finds that either of these two components exists, the Secretary is directed to recommend to the EPA Administrator a 50 percent waiver of RFS requirements for the petitioner."¹¹ Congress subsequently directed EPA to follow DOE's recommendation, and to report to Congress if it did not.¹²

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As an initial matter, it is not clear whether the "at any time" language in the statute also allows EPA to grant these gap-filling petitions. *See* CAA 211(o)(9)(B)(i). The statutory language certainly does not preclude EPA from considering the time that has elapsed between the compliance year and when a small refinery petitions for relief as a factor in determining whether to grant such relief. Indeed, it seems unlikely that Congress contemplated or intended to allow a small refinery to obtain hardship relief through submitting a petition in calendar year 2020 for RFS compliance year 2011, for example. Moreover, it is unclear whether EPA has authority to grant a GFP when the small refinery which submitted it already complied with its RFS obligations for that prior year. Where a refinery has successfully complied with the RFS and did not apply for hardship relief until a number of years after the purported hardship, EPA finds that it is appropriate for such refinery to clearly and convincingly demonstrate hardship, particularly

Energy that explains the Agency position. Such report shall be provided 10 days prior to issuing a decision on a waiver petition.").

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Based on DOE's recommendations, I am denying exemptions for the gap-filling petitions that seek reconsideration of prior EPA decisions because those small refineries have not provided any new information that would necessitate EPA changing its prior decisions for those RFS compliance years. DOE and EPA thoroughly and carefully evaluated the petitions for those years at that time, and EPA has found nothing in these new submissions that would merit a change in those previous decisions. These small refineries did not demonstrate then or now that they experienced disproportionate economic hardship from compliance with the RFS program and do not warrant an exemption for those RFS compliance years. EPA recognizes that some of its small refinery exemption policies may have changed between 2011 and the present. However, we do not believe it is appropriate in these cases to change our past decisions based on new policies, especially given the length of time that has passed since our original decisions, the lack of material new information supporting a different outcome, and the remedial difficulties associated with providing relief many years after compliance was already achieved.

Based on DOE's recommendations, I am denying exemptions for those gap-filling petitions where DOE recommended no relief. In these instances, EPA agrees with DOE's evaluation and recommendation that these small refineries did not demonstrate disproportionate economic hardship from compliance with the RFS program for those RFS compliance years. Several of these petitions alleging hardship date back to 2011. If such hardship was occurring in those prior RFS compliance years, these small refineries likely would have petitioned for relief in each of those preceding RFS compliance years. Instead, these small refineries consistently complied with their annual RFS obligations while continuing to participate in the refining industry. Given such circumstances, these small refineries have not demonstrated the requisite hardship to garner exemptions now for those past RFS compliance years.

I am also denying exemptions for all the gap-filling petitions where DOE recommended 50 percent relief. EPA doubts that Congress intended to exempt small refineries that already successfully complied with their RFS obligations many years past without demonstrating that they experienced disproportionate economic hardship as a result of that compliance. Despite the difficulty DOE may have identified through use of its scoring matrix, that difficulty was not enough to prevent these same small refineries from fully complying with their past annual RFS obligations and remain a commercial entity. Again, these small refineries have not demonstrated disproportionate economic hardship in 2020 for RFS compliance years 2011 through 2018 when those same refineries already successfully complied with those prior RFS obligations.

This decision is appropriate under the Act and is consistent with the case law recognizing EPA's

¹⁷ EPA also notes that it is not clearly established whether a so-called "continuous exemption" is created by EPA granting a gap-filling petition many years after the small refinery has already complied with its RFS obligation for that year.

independent authority in deciding whether to grant or deny RFS small refinery petitions.¹⁸ This decision is a nationally applicable final agency action for purposes of CAA section 307(b)(1). In the alternative, EPA finds that this final action is based on a determination of nationwide scope or effect for purposes of CAA section 307(b)(1). This decision addresses gap-filling petitions filed by 17 small refineries in 14 states and spanning seven federal judicial circuits together in a single action, applying the same analysis to similarly situated small refineries, as explained above. For this reason, this final action is nationally applicable, or, in the alternative, EPA finds that this action is based on a determination of nationwide scope or effect for purposes of section 307(b)(1). Thus, pursuant to section 307(b), any petitions for review of this final action must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date this final action is published in the Federal Register.

This action is not a rulemaking and is not subject to the various statutory and other provisions applicable to a rulemaking.

¹⁸ *Sinclair Wyoming Refining Co. v. EPA*, 874 F.3d 1159, 1166 (10th Cir. 2017); *See also Hermes Consol.*, 787 F.3d at 574-575; *Lion Oil Co. v. EPA*, 792 F.3d 978, 982-983 (8th Cir. 2015).

EXHIBIT B

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CALUMET MONTANA REFINING, LLC,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

Case No. _____

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 9th Circuit Rule 26.1, Petitioner Calumet Montana Refining, LLC, provides the following corporate disclosure statement:

Calumet Montana Refining, LLC is incorporated under the laws of Delaware. Calumet Montana Refining, LLC is owned 100% by Calumet Specialty Products Partners, L.P., which is incorporated under the laws of Delaware. Calumet Specialty Products Partners, L.P. is a refiner of petroleum products. Calumet Specialty Products Partners, L.P. has no parent company, and no publicly held company has a 10 percent or greater ownership interest in it.

Petitioner will file a revised corporate disclosure statement should it become aware of a change in corporate ownership interests that would affect the

disclosures required by Rule 26.1.

Dated: November 27, 2020

Respectfully submitted,

s/ Sopen Shah

Sopen Shah
PERKINS COIE LLP
33 East Main Street, Suite 201
Madison, WI 53703-3095
Telephone: 608.663.7480
Facsimile: 608.663.7499
SShah@perkinscoie.com

Jonathan G. Hardin (*admission
application pending*)
PERKINS COIE LLP
700 Thirteenth Street, N.W., Suite 800
Washington, D.C. 20005-3960
Telephone: 202.654.6297
Facsimile: 202.654.6211
JHardin@perkinscoie.com

Attorneys for Petitioner

CERTIFICATE OF SERVICE

Pursuant to Federal Rules of Appellate Procedure 3(d), 15(c) and 25, 9th Circuit Rule 25, and 40 C.F.R. § 23.12(a), I hereby certify that on November 27, 2020, I will cause copies of the foregoing Petition for Review and Corporate Disclosure Statement to be served by certified mail, return receipt requested upon the following:

HON. ANDREW WHEELER, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

CORRESPONDENCE CONTROL UNIT
Office of General Counsel (2311)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

HON. WILLIAM BARR
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

HON. JEFFREY BOSSERT CLARK
Assistant Attorney General
Environmental and Natural Resources Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Dated: November 27, 2020

s/ Sopen Shah
Sopen Shah
PERKINS COIE LLP

Message

From: Stahle, Susan [Stahle.Susan@epa.gov]
Sent: 11/18/2020 3:31:35 PM
To: Bunker, Byron [bunker.byron@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]; Michaels, Lauren [Michaels.Lauren@epa.gov]; Nelson, Karen [nelson.karen@epa.gov]; Parsons, Nick [Parsons.Nick@epa.gov]; McKenna, Chris [McKenna.Chris@epa.gov]
CC: Hengst, Benjamin [Hengst.Benjamin@epa.gov]; Caballero, Kathryn [Caballero.Kathryn@epa.gov]; Weihrauch, John [Weihrauch.John@epa.gov]
Subject: FW: NEW LITIGATION CAA - [Ex. 4 CBI] v. EPA, No. 20-1456 (D.C. Cir.)
Attachments: [Ex. 4 CBI] EPA - Gap-filling Case - DC Circuit -20-1456.pdf

FYI. Please share with your OAR management and further within OTAQ.

Susan Stahle
 Air and Radiation Law Office
 Office of General Counsel
 U.S. Environmental Protection Agency
 WJCN-7502B
 202-564-1272

From: Stahle, Susan
Sent: Wednesday, November 18, 2020 10:30 AM
To: OGC Immediate Office MGMT <OGC_Immediate_Office_MGMT@epa.gov>; OGC Immediate Office Support <OGCFrontOfficeSupportStaff@epa.gov>
Cc: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>; Li, Ryland (Shengzhi) <Li.Ryland@epa.gov>; Miller, Meredith <Miller.Meredith@epa.gov>
Subject: NEW LITIGATION CAA - [Ex. 4 CBI] v. EPA, No. 20-1456 (D.C. Cir.)

On November 13, 2020, [Ex. 4 CBI] filed the attached petition for review in the D.C. Circuit Court of Appeals challenging a decision EPA issued on September 14, 2020, entitled "Denial of Small Refinery Gap-Filling Petitions." This decision included a denial of [Ex. 4 CBI] gap-filling petitions for RFS compliance years 2014, 2015 and 2016. The decision is attached as Exhibit A to the petition for review.

This case is related to the new litigation email sent yesterday (Ninth Circuit filing No. 20-73366).

Susan Stahle
 Air and Radiation Law Office
 Office of General Counsel
 U.S. Environmental Protection Agency
 WJCN-7502B
 202-564-1272

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Kern Oil & Refining Co.,

Petitioner,

v.

**United States Environmental
Protection Agency,**

Respondent.

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Case No.: 20-1456

PETITION FOR REVIEW

Pursuant to Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), and Rule 15(a) of the Federal Rules of Appellate Procedure, Kern Oil & Refining Co. (“Kern Oil”) hereby petitions this Court for review of the following final agency action of the Administrator of the United States Environmental Protection Agency (“EPA”): *Denial of Small Refinery Gap-Filling Petitions*. (See Exhibit A). This agency action denied Kern Oil’s petitions for small refinery exemptions under the Renewable Fuel Standard program for compliance years 2014, 2015, and 2016. Kern Oil submitted those petitions to EPA on March 3, 2020.

EPA did not date the agency action, but EPA represented in subsequent email correspondence with Kern Oil that EPA issued the agency action on September 14, 2020. To Kern Oil’s knowledge, the agency action has not been published in the

Federal Register. While EPA attempted to email the agency action to Kern Oil on September 17, 2020, Kern Oil did not actually receive that correspondence from EPA until October 19, 2020. (*See* Exhibit A). This petition for review is timely pursuant to 42 U.S.C. § 7607(b)(1) and 40 C.F.R. § 23.3.

Kern Oil has filed a petition for review of the same final agency action in the United States Court of Appeals for the Ninth Circuit because Kern Oil believes that jurisdiction and venue are proper in the Ninth Circuit. Kern Oil is filing this petition as a protective measure because EPA stated in the agency action that “any petitions for review of this final action must be filed in the Court of Appeals for the District of Columbia within 60 days from the date this final action is published in the Federal Register.” (*See* Exhibit A).

Section 307(b)(1) of the Clean Air Act requires that any final agency action “which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit.” 42 U.S.C. § 7607(b)(1). The action in this case applies to one refinery that is located in Bakersfield, California. Notwithstanding this fact, EPA has taken the position that “this final action is nationally applicable, or, in the alternative, EPA finds that this action is based on a determination of nationwide scope or effect for purposes of section 307(b)(1).” Although Kern Oil was not mentioned in this memorandum, EPA argues that the memorandum was a nationally applicable action.

In summary, although Kern Oil believes its petition for review is properly before the Ninth Circuit, Kern Oil is filing this petition for review out of an abundance of caution, as a protective measure, and without waiving any arguments that jurisdiction and venue are proper in the Ninth Circuit.

[Signature page follows.]

Dated: November 13, 2020

Respectfully submitted,

/s/ Susan G. Lafferty

Susan G. Lafferty

D.C. Circuit Bar No. 47582

EVERSHEDS SUTHERLAND (US) LLP

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Washington, DC 20001-3980

202.637.3593 (tel)

202.383.0168 (fax)

susanlafferty@eversheds-sutherland.us

David M. McCullough

D.C. Circuit Bar No. 54995

EVERSHEDS SUTHERLAND (US) LLP

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212.389.5000 (tel)

212.389.5099 (fax)

davidmccullough@eversheds-sutherland.us

Counsel for Petitioner

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Kern Oil & Refining Co.,

Petitioner,

v.

**United States Environmental
Protection Agency,**

Respondent.

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Case No.: 20-1456

CERTIFICATE OF CORPORATE DISCLOSURE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Kern Oil & Refining Co. (“Kern Oil”) provides the following corporate disclosure statement:

Kern Oil is a wholly-owned subsidiary of Casey Co., a privately-held California corporation. Neither Kern Oil nor Casey Co. has any ownership relationship with a publicly-held company.

Dated: November 13, 2020

Respectfully submitted,

/s/ Susan G. Lafferty

Susan G. Lafferty

D.C. Circuit Bar No. 47582

EVERSHEDS SUTHERLAND (US) LLP

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212.389.5099 (fax)
davidmccullough@eversheds-sutherland.us

Counsel for Petitioner

CERTIFICATE OF SERVICE

Pursuant to Federal Rules of Appellate Procedure 3(d), 15(c), and 25, and 40 C.F.R. § 23.12(a), I hereby certify that a copy of the foregoing was mailed by certified mail, return receipt requested to the following:

Administrator Andrew Wheeler
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave., NW
Washington, DC 20460

Hon. William Barr
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Correspondence Control Unit
Office of General Counsel (2311)
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

Dated: November 13, 2020

Respectfully submitted,

/s/ Susan G. Lafferty

Susan G. Lafferty

D.C. Circuit Bar No. 47582

EVERSHEDS SUTHERLAND (US) LLP

700 Sixth Street, NW, Suite 700

Washington, DC 20001-3980

202.637.3593 (tel)

202.383.0168 (fax)


susanlafferty@eversheds-sutherland.us

Counsel for Petitioner

Exhibit A



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SUBJECT: Denial of Small Refinery Gap-Filling Petitions  THE ADMINISTRATOR
FROM: Andrew Wheeler, Administrator of the U.S. Environmental Protection Agency
TO: Small Refineries That Have Submitted Gap-Filling Petitions for an Exemption from the Renewable Fuel Standard Program

Section 211(o)(9) of the Clean Air Act (CAA or the Act) authorizes the Administrator to temporarily exempt small refineries from their renewable fuel volume obligations under the Renewable Fuel Standard (RFS) program “for the reason of disproportionate economic hardship.” Congress created three classes of exemptions from the RFS program for “small refiner[ies],” which are defined as refineries with crude oil throughput averaging 75,000 barrels or less per day for a calendar year.¹ First, Congress granted all small refineries a blanket exemption from the RFS program until 2011.² Second, Congress directed the Department of Energy (DOE) to conduct a study³ “to determine whether compliance with the requirements of [the RFS program] would impose a disproportionate economic hardship on small refineries.”⁴ For any small refinery that DOE determined would experience disproportionate economic hardship, Congress directed EPA to “extend the exemption under clause (i) for the small refinery for a period of not less than 2 additional years.”⁵ Third, Congress provided that a small refinery “may at any time petition the Administrator for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship.”⁶ In considering such a petition, “the Administrator, in consultation with the Secretary of Energy, shall consider the findings of the [DOE] study and other economic factors.”⁷

EPA issued regulations governing small refinery exemptions (SRE) in 2010 and amended them in 2014.⁸ The 2010 regulations implemented all three classes of exemptions and defined “small refinery” the same for all three classes. EPA regarded as eligible for an exemption only those small refineries that qualified for, and thus received, the blanket statutory exemption by not

¹ CAA section 211(o)(9), (o)(1)(K); 40 C.F.R. 80.1401.

² CAA section 211(o)(9)(A)(i).

³ “Small Refinery Exemption Study, An Investigation into Disproportionate Economic Hardship,” Office of Policy and International Affairs, U.S. Department of Energy, March 2011 (DOE Small Refinery Study).

⁴ CAA section 211(o)(9)(A)(ii)(I).

⁵ CAA section 211(o)(9)(A)(ii)(II).

⁶ CAA section 211(o)(9)(B)(i).

⁷ CAA section 211(o)(9)(B)(ii); 40 C.F.R. 80.1441.

⁸ 75 Fed. Reg. 14,670 (Mar. 26, 2010); 79 Fed. Reg. 42,128 (July 18, 2014).

exceeding the 75,000-barrel-per-day crude-throughput threshold for the 2006 calendar year.⁹ In 2014, EPA amended its regulations and considered a small refinery eligible to petition for an exemption under the statute based on a small refinery's crude throughput during the desired exemption period and the year immediately preceding the petition.¹⁰ EPA was therefore considering petitions and granting exemptions based on this eligibility provision and its analysis of disproportionate economic hardship (DEH). EPA did not require a small refinery to demonstrate receipt of a continuous exemption to evaluate its petition.

As part of EPA's evaluation process, and consistent with its statutory obligation to consult DOE, EPA asks DOE to evaluate all the information EPA receives from each petitioner. DOE's expertise in evaluating economic conditions at U.S. refineries is fundamental to the process both DOE and EPA use to identify whether DEH exists for petitioning small refineries in the context of the RFS program. After evaluating the information submitted by the petitioner, DOE provides a recommendation to EPA on whether a small refinery merits an exemption from RFS obligations. As described in the DOE Small Refinery Study, DOE assesses the potential for DEH at a small refinery based on two sets of metrics. One set of metrics assesses structural and economic conditions that could disproportionately affect the refinery (collectively described as "disproportionate impacts" when referencing Section 1 and Section 2 of DOE's scoring matrix). The other set of metrics assesses the financial conditions that could cause viability concerns at the refinery (described as "viability impairment" when referencing Section 3 of DOE's scoring matrix). DOE's recommendation informs EPA's decision about whether to grant or deny an SRE petition for a small refinery.

Previously, DOE and EPA had considered that DEH exists only when a small refinery demonstrates that it experiences *both* disproportionate impacts *and* viability impairment. However, in response to concerns that the two agencies' threshold for establishing DEH was too stringent, Congress in 2016 clarified that DEH can exist if DOE finds that a small refinery is experiencing *either* disproportionate impacts *or* viability impairment, in which case Congress directed DOE to recommend a 50 percent exemption from the RFS. This was relayed in an explanatory statement accompanying the 2016 Appropriations Act that stated: "If the Secretary finds that either of these two components exists, the Secretary is directed to recommend to the EPA Administrator a 50 percent waiver of RFS requirements for the petitioner."¹¹ Congress subsequently directed EPA to follow DOE's recommendation, and to report to Congress if it did not.¹²

⁹ CAA section 211(o)(1)(K); 40 C.F.R. 80.1141(a)(1), 80.1441(a)(1).

¹⁰ CAA section 211(o)(9)(B)(i); 40 C.F.R. 80.1441(e)(2)(iii).

¹¹ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (2015). The Explanatory Statement is available at: <https://rules.house.gov/bill/114/hr-2029-sa>.

¹² Senate Report 114-281 ("When making decisions about small refinery exemptions under the RFS program, the Agency is directed to follow DOE's recommendations which are to be based on the original 2011 Small Refinery Exemption Study prepared for Congress and the conference report to division D of the Consolidated Appropriations Act of 2016. Should the Administrator disagree with a waiver recommendation from the Secretary of Energy, either to approve or deny, the Agency shall provide a report to the Committee on Appropriations and to the Secretary of

On January 24, 2020, in the *Renewable Fuels Association (RFA)* case, the Tenth Circuit Court of Appeals decided a challenge to EPA's grant of small refinery exemptions to three small refineries.¹³ The court held that EPA had exceeded its CAA statutory authority and impermissibly granted the petitions because the three refineries had not received an exemption for all prior years of the RFS program.¹⁴ According to the Court, "[b]ecause an 'extension' requires a small refinery exemption in prior years to prolong, enlarge or add to, the three refinery petitions in this case were improvidently granted. The amended Clean Air Act did not authorize the EPA to grant these petitions."¹⁵

Since March 2020, 17 small refineries in 14 states in seven federal judicial circuits have submitted 68 individual petitions asking EPA either to reconsider exemption denials (1) or grant exemptions for prior years in which the refineries had not sought them (54). It appears that these small refineries have attempted to fill their exemption extension "gaps" through the filing of these petitions. Thus, as shorthand, EPA generically calls all these petitions "gap-filling petitions" (GFPs). The majority of the GFPs were received in March 2020, although additional GFPs were received in June, August and September of 2020.

Starting in April 2020, EPA provided DOE with these GFPs spanning from RFS compliance years 2011 to 2018 to be evaluated for DEH. DOE transmitted its findings on 54 of the 68 GFPs at the end of July 2020.¹⁶ In its recommendations for those GFPs for which it provided its findings, DOE found that while most of the small refineries had demonstrated some degree of structural hardships during the years related to their petitions, none of the small refineries had demonstrated that their viability was affected. For these reasons, DOE recommended either no relief or 50 percent relief for each of the small refineries that submitted GFPs.

As an initial matter, it is not clear whether the "at any time" language in the statute also allows EPA to grant these gap-filling petitions. *See* CAA 211(o)(9)(B)(i). The statutory language certainly does not preclude EPA from considering the time that has elapsed between the compliance year and when a small refinery petitions for relief as a factor in determining whether to grant such relief. Indeed, it seems unlikely that Congress contemplated or intended to allow a small refinery to obtain hardship relief through submitting a petition in calendar year 2020 for RFS compliance year 2011, for example. Moreover, it is unclear whether EPA has authority to grant a GFP when the small refinery which submitted it already complied with its RFS obligations for that prior year. Where a refinery has successfully complied with the RFS and did not apply for hardship relief until a number of years after the purported hardship, EPA finds that it is appropriate for such refinery to clearly and convincingly demonstrate hardship, particularly

Energy that explains the Agency position. Such report shall be provided 10 days prior to issuing a decision on a waiver petition.").

¹³ *Renewable Fuels Ass'n et al. v. EPA*, 948 F.3d 1206 (10th Cir. 2020) (*RFA* decision).

¹⁴ *Id.* at 1244-1249.

¹⁵ *Id.* at 1249.

¹⁶ DOE has not provided its recommendations for the remaining 14 GFPs. This document does not address those petitions.

in light of open questions regarding the Agency's statutory authority and the availability of relief for compliance years that have long since been closed.¹⁷ EPA has not fully explored these and other difficult legal issues raised by these petitions. Regardless, assuming without deciding that these petitions are properly before the Agency, I provide my decisions on them below.

Based on DOE's recommendations, I am denying exemptions for the gap-filling petitions that seek reconsideration of prior EPA decisions because those small refineries have not provided any new information that would necessitate EPA changing its prior decisions for those RFS compliance years. DOE and EPA thoroughly and carefully evaluated the petitions for those years at that time, and EPA has found nothing in these new submissions that would merit a change in those previous decisions. These small refineries did not demonstrate then or now that they experienced disproportionate economic hardship from compliance with the RFS program and do not warrant an exemption for those RFS compliance years. EPA recognizes that some of its small refinery exemption policies may have changed between 2011 and the present. However, we do not believe it is appropriate in these cases to change our past decisions based on new policies, especially given the length of time that has passed since our original decisions, the lack of material new information supporting a different outcome, and the remedial difficulties associated with providing relief many years after compliance was already achieved.

Based on DOE's recommendations, I am denying exemptions for those gap-filling petitions where DOE recommended no relief. In these instances, EPA agrees with DOE's evaluation and recommendation that these small refineries did not demonstrate disproportionate economic hardship from compliance with the RFS program for those RFS compliance years. Several of these petitions alleging hardship date back to 2011. If such hardship was occurring in those prior RFS compliance years, these small refineries likely would have petitioned for relief in each of those preceding RFS compliance years. Instead, these small refineries consistently complied with their annual RFS obligations while continuing to participate in the refining industry. Given such circumstances, these small refineries have not demonstrated the requisite hardship to garner exemptions now for those past RFS compliance years.

I am also denying exemptions for all the gap-filling petitions where DOE recommended 50 percent relief. EPA doubts that Congress intended to exempt small refineries that already successfully complied with their RFS obligations many years past without demonstrating that they experienced disproportionate economic hardship as a result of that compliance. Despite the difficulty DOE may have identified through use of its scoring matrix, that difficulty was not enough to prevent these same small refineries from fully complying with their past annual RFS obligations and remain a commercial entity. Again, these small refineries have not demonstrated disproportionate economic hardship in 2020 for RFS compliance years 2011 through 2018 when those same refineries already successfully complied with those prior RFS obligations.

This decision is appropriate under the Act and is consistent with the case law recognizing EPA's

¹⁷ EPA also notes that it is not clearly established whether a so-called "continuous exemption" is created by EPA granting a gap-filling petition many years after the small refinery has already complied with its RFS obligation for that year.

independent authority in deciding whether to grant or deny RFS small refinery petitions.¹⁸ This decision is a nationally applicable final agency action for purposes of CAA section 307(b)(1). In the alternative, EPA finds that this final action is based on a determination of nationwide scope or effect for purposes of CAA section 307(b)(1). This decision addresses gap-filling petitions filed by 17 small refineries in 14 states and spanning seven federal judicial circuits together in a single action, applying the same analysis to similarly situated small refineries, as explained above. For this reason, this final action is nationally applicable, or, in the alternative, EPA finds that this action is based on a determination of nationwide scope or effect for purposes of section 307(b)(1). Thus, pursuant to section 307(b), any petitions for review of this final action must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date this final action is published in the Federal Register.

This action is not a rulemaking and is not subject to the various statutory and other provisions applicable to a rulemaking.

¹⁸ *Sinclair Wyoming Refining Co. v. EPA*, 874 F.3d 1159, 1166 (10th Cir. 2017); *See also Hermes Consol.*, 787 F.3d at 574-575; *Lion Oil Co. v. EPA*, 792 F.3d 978, 982-983 (8th Cir. 2015).

From: Cohen, Janet <cohen.janet@epa.gov>

Sent: October 19, 2020 2:31 PM

To: rwinchester@kernoil.com

Cc: jdehart@manatt.com; Dominguez, Alexander <dominguez.alexander@epa.gov>; Idsal, Anne <idsal.anne@epa.gov>

Subject: Resend: September 14, 2020 Small Refinery Decision Memo

Mr. Winchester,

I am sorry that you did not receive the original email we sent to small refineries covered by our September 14, 2020 decision memo. Chris McKenna subsequently sent you a copy of the email, but because we blind-copied the refineries to protect confidentiality, your name, along with the other recipients, would not show up on the addressee list. Therefore I am including a redacted screenshot here that does show your name as a recipient. I've also attached the original email below.

Janet Cohen, Associate Director
Compliance Division
USEPA Office of Transportation and Air Quality
734-214-4511 (office)
734-417-8271 (mobile)
cohen.janet@epa.gov

.....
Screenshot:



September 14, 2020 Small Refinery Decision Memo



Cohen, Janet

To: Cohen, Janet

Cc: Nelson, Karen; Byron Bunker; Hengst, Benjamin; Stahle, Susan

Bcc:

[Redacted] y: rwind

Retention Policy: Permanent (Capstone approach) (Never)

Expires: Never

Good afternoon,

You are receiving this email because you submitted one or more petitions for an RFS small refinery exemption for prior decision memo issued on September 14, 2020. Please see EPA's September 14, 2020 memo regarding the disposition of

Janet Cohen, Associate Director
Compliance Division
USEPA Office of Transportation and Air Quality
734-214-4511 (office)
734-417-8271 (mobile)

Original Email:

From: Cohen, Janet

Sent: Thursday, September 17, 2020 2:50 PM

To: Cohen, Janet <cohen.janet@epa.gov>

Cc: Nelson, Karen <nelson.karen@epa.gov>; Byron Bunker <Bunker.Byron@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>

Subject: September 14, 2020 Small Refinery Decision Memo

Good afternoon,

You are receiving this email because you submitted one or more petitions for an RFS small refinery exemption for prior compliance years that were addressed in a decision memo issued on September 14, 2020. Please see EPA's September 14, 2020 memo regarding the disposition of your request(s), available [here](#).

Janet Cohen, Associate Director

USCA Case #20-1456 Document #1871539
Compliance Division
USEPA Office of Transportation and Air Quality
734-214-4511 (office)
734-417-8271 (mobile)

Filed: 11/13/2020 Page 16 of 16

Message

From: Caballero, Kathryn [Caballero.Kathryn@epa.gov]
Sent: 2/3/2020 9:59:57 PM
To: Bunker, Byron [bunker.byron@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]; Nelson, Karen [nelson.karen@epa.gov]; Michaels, Lauren [Michaels.Lauren@epa.gov]; Machiele, Paul [machiele.paul@epa.gov]; Hengst, Benjamin [Hengst.Benjamin@epa.gov]; Parsons, Nick [Parsons.Nick@epa.gov]; Burkholder, Dallas [burkholder.dallas@epa.gov]; McKenna, Chris [McKenna.Chris@epa.gov]; Weihrauch, John [Weihrauch.John@epa.gov]; Spencer, Mark [spencer.mark@epa.gov]
Subject: SRE paper that OGC developed for their front office (sent Thursday night)
Attachments: RFA Decision - Implementing the Decision - draft - 012920.docx

Realizing that not everyone may have this OGC response to recent SRE legal questions and sharing with the 1 pm SRE meeting group. Thanks.

Kathryn Pirrotta Caballero
Supervising/Senior Attorney, Compliance Division
Office of Transportation and Air Quality
(w) 202-564-1849

Mailing Address:
US Environmental Protection Agency
Office of Transportation and Air Quality
Compliance Division (MC 6401A)
1200 Pennsylvania Avenue, NW
Washington DC 20460

Message

From: Bunker, Byron [bunker.byron@epa.gov]
Sent: 8/16/2019 4:12:20 PM
To: Nelson, Karen [nelson.karen@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]
CC: Stahle, Susan [Stahle.Susan@epa.gov]; McKenna, Chris [McKenna.Chris@epa.gov]; Michaels, Lauren [Michaels.Lauren@epa.gov]; Dubey, Susmita [dubey.susmita@epa.gov]; Hengst, Benjamin [Hengst.Benjamin@epa.gov]
Subject: RE: Draft Message re. NOT giving 2019 RINs out for 2018 SREs

Thanks Karen.

Your approach sounds good and I think if you can circulate it by COB on Monday that should work. Hopefully, we can then discuss it at Tuesday's team meeting.

Thanks,

Byron

Byron Bunker
 Director Compliance Division
 Office of Transportation and Air Quality
 Environmental Protection Agency
 2000 Traverwood Drive
 Ann Arbor, MI 48105
 Bunker.Byron@epa.gov
 Phone: (734) 214-4155

Ex. 6 Personal Privacy (PP)

From: Nelson, Karen <nelson.karen@epa.gov>
Sent: Friday, August 16, 2019 12:05 PM
To: Bunker, Byron <bunker.byron@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>
Cc: Stahle, Susan <Stahle.Susan@epa.gov>; McKenna, Chris <McKenna.Chris@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Subject: RE: Draft Message re. NOT giving 2019 RINs out for 2018 SREs

Roger that! I'm putting together a one(ish)-pager on three things (they won't necessarily be organized in this order, though): 1) background on issue from earlier briefings with BW, 2) draft note to send the refineries, and 3) explaining what happens for the refineries that decided to carry a deficit while their petition was still pending.

I'll try to circulate it before our team meeting on Tuesday. Is that soon enough, or would you rather I circulate a draft before COB today?

-Karen

From: Bunker, Byron <bunker.byron@epa.gov>
Sent: Friday, August 16, 2019 11:57 AM
To: Cohen, Janet <cohen.janet@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>
Cc: Stahle, Susan <Stahle.Susan@epa.gov>; McKenna, Chris <McKenna.Chris@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>; Hengst, Benjamin

<Hengst.Benjamin@epa.gov>

Subject: RE: Draft Message re. NOT giving 2019 RINs out for 2018 SREs

Hi Karen,

Adding one more thing to our to do list on this.

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Thanks,

Byron

Byron Bunker
Director Compliance Division
Office of Transportation and Air Quality
Environmental Protection Agency
2000 Traverwood Drive
Ann Arbor, MI 48105
Bunker.Byron@epa.gov
Phone: (734) 214-4155

Ex. 6 Personal Privacy (PP)

From: Bunker, Byron

Sent: Friday, August 16, 2019 9:37 AM

To: Cohen, Janet <cohen.janet@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>

Cc: Stahle, Susan <Stahle.Susan@epa.gov>; McKenna, Chris <mckenna.chris@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>

Subject: RE: Draft Message re. NOT giving 2019 RINs out for 2018 SREs

Hi Karen,

Can you take the lead on this with two tasks?

1)

Ex. 5 Deliberative Process (DP)

2)

I would like to get this in front of Anne as soon as possible.

Thanks,

Byron

Byron Bunker
Director Compliance Division
Office of Transportation and Air Quality
Environmental Protection Agency
2000 Traverwood Drive
Ann Arbor, MI 48105
Bunker.Byron@epa.gov
Phone: (734) 214-4155

Ex. 6 Personal Privacy (PP)

From: Cohen, Janet <cohen.janet@epa.gov>
Sent: Thursday, August 15, 2019 8:16 PM
To: Nelson, Karen <nelson.karen@epa.gov>
Cc: Stahle, Susan <Stahle.Susan@epa.gov>; McKenna, Chris <McKenna.Chris@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Subject: Re: Draft Message re. NOT giving 2019 RINs out for 2018 SREs

Karen, I'm still out tomorrow but I am accessible now and can make myself available if you need me. I agree with sue that we should talk about it his one. - J. -

On Aug 15, 2019, at 2:59 PM, Nelson, Karen <nelson.karen@epa.gov> wrote:

Thanks Sue, you're right.

Should I put something on the calendar? Or wait to hear from Byron/Ben with direction?

Thanks!
-Karen

From: Stahle, Susan <Stahle.Susan@epa.gov>
Sent: Thursday, August 15, 2019 1:36 PM
To: Nelson, Karen <nelson.karen@epa.gov>; McKenna, Chris <McKenna.Chris@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>
Cc: Bunker, Byron <bunker.byron@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Subject: RE: Draft Message re. NOT giving 2019 RINs out for 2018 SREs

Karen –

Given the letter we just got on this I am thinking we might want to hold off on sending anything back to the small refineries. I think we are going to need to do some more thinking on how to respond to this issue.

Ex. 5 Deliberative Process (DP) / Attorney-Client Privilege / Attorney Work Product

I suspect we will want to circle the wagons and talk through this.

Thanks,

Susan Stahle
Air and Radiation Law Office

Office of General Counsel
U.S. Environmental Protection Agency
WJCN-7502B
202-564-1272

From: Nelson, Karen <nelson.karen@epa.gov>
Sent: Thursday, August 15, 2019 9:59 AM
To: Stahle, Susan <Stahle.Susan@epa.gov>; McKenna, Chris <McKenna.Chris@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>
Subject: Draft Message re. NOT giving 2019 RINs out for 2018 SREs

Hi Sue, Chris, and Lauren,

Byron asked me to put some language together for the folks in fuels data center to use or pull from when responding to small refinery requests for 2019 RINs instead of the 2017-2018 RINs they had retired for compliance. I'd like you guys to review it, please, before I send it to Byron for John Weihrauch's team to start using. Thanks! -Karen

Draft:

Ex. 5 Deliberative Process (DP)

Thank you for your time.

Sincerely,
Karen Nelson
Compliance Division
(734) 214-4657

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Message

From: Nelson, Karen [nelson.karen@epa.gov]
Sent: 9/17/2019 5:49:04 PM
To: Cohen, Janet [cohen.janet@epa.gov]
Subject: DPP & CBI: Denial of New Vintage RINs
Attachments: DRAFT_Response Denying New Vintage RINs for 2016 SRE_8.1.18.docx

Hi Janet,

Here's the draft of the letter for Ex. 5 Deliberative Process (DP) / Ex. 4 CBI from a while ago.

It's in the Ex. 5 Deliberative Process (DP) / Ex. 4 CBI petition folder on the share point site, if you'd like to edit it there.

Thank you for your time.

Sincerely,
Karen Nelson
Compliance Division
(734) 214-4657

Do not release without review. This email and any attached documents may contain information claimed as CBI, confidential attorney-client communications, privileged attorney work product, and/or privileged and confidential deliberative process material.

Message

From: Bunker, Byron [bunker.byron@epa.gov]
Sent: 8/15/2019 9:32:49 PM
To: Hengst, Benjamin [Hengst.Benjamin@epa.gov]
CC: Cohen, Janet [cohen.janet@epa.gov]; Nelson, Karen [nelson.karen@epa.gov]; Stahle, Susan [Stahle.Susan@epa.gov]; Dubey, Susmita [dubey.susmita@epa.gov]
Subject: RE: Thanks + Question

Thanks Ben.

Agreed that it makes sense to hold responding until we have a prepared response that reflects any deliberation/consideration of the request from the smalls for 2019 RINs.

That said, I really think the only answer is that we give back the mix of RINs that the party originally retired for compliance. Conceptually and I believe literally, we reverse the retirement action returning those same serialized RINs.

Thanks,

Byron

Byron Bunker
 Director Compliance Division
 Office of Transportation and Air Quality
 Environmental Protection Agency
 2000 Traverwood Drive
 Ann Arbor, MI 48105
 Bunker.Byron@epa.gov
 Phone: (734) 214-4155

Ex. 6 Personal Privacy (PP)

From: Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Sent: Thursday, August 15, 2019 5:22 PM
To: Bunker, Byron <bunker.byron@epa.gov>
Cc: Cohen, Janet <cohen.janet@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>
Subject: Fwd: Thanks + Question

Byron—I won't respond until you and I connect on this.

Begin forwarded message:

From: Geoff Cooper <GCooper@ethanolrfa.org>
Date: August 15, 2019 at 4:54:54 PM EDT
To: "Hengst, Benjamin" <Hengst.Benjamin@epa.gov>
Subject: Thanks + Question

Ben,

Thanks again for setting up the meeting with Sarah yesterday; I really appreciated the chance to sit down and catch up with you guys.

I had a question that I was hoping you might be able to help out with: when EPA approves a small refiner exemption, what is the vintage of the RINs that are returned to the refiner who received the exemption?

For example, Refiner X presumably demonstrated compliance with its 2018 RVO on or before the March 31, 2019 deadline. So, if Refiner X received a 2018 exemption in August 2019, are all the RINs returned to Refiner X vintage 2018 RINs, or would the RINs returned represent the same mix of vintage 2017s and 2018s that Refiner X used to demonstrate compliance? Or are vintage 2019 RINs created and provided to the refiner in an amount equal to the exemption since the petition was decided in 2019? Or? Hopefully that makes sense. Is the process of reconciling RIN accounts following a retroactive SRE laid out clearly anywhere? Thanks!

Geoff

Geoff Cooper

President & CEO

Renewable Fuels Association

16024 Manchester Rd. Suite 101

Ellisville, MO 63011

O: 636.594.2284

Ex. 6 Personal Privacy (PP)

CONFIDENTIALITY NOTE: This e-mail message, including any attachment(s), contains information that may be confidential, protected by the attorney-client or other legal privileges, and/or proprietary non-public information. If you are not an intended recipient of this message or an authorized assistant to an intended recipient, please notify the sender by replying to this message and then delete it from your system. Use, dissemination, distribution, or reproduction of this message and/or any of its attachments (if any) by unintended recipients is not authorized and may be unlawful.

Message

From: Stahle, Susan [Stahle.Susan@epa.gov]
Sent: 11/19/2019 4:34:30 PM
To: Nelson, Karen [nelson.karen@epa.gov]
CC: Cohen, Janet [cohen.janet@epa.gov]; Bunker, Byron [bunker.byron@epa.gov]; Hengst, Benjamin [Hengst.Benjamin@epa.gov]
Subject: RIN replacement letter - clean version for you to send to OAR management
Attachments: CONFIDENTIAL_2019.08.13_Small Refinery Owners Letter.pdf; Response to PC letter - clean draft - 111919.docx

Hi –

I got the green light to move this letter forward, so here is the clean version I will be sending to Justin right now in a separate email. We will be mentioning this letter today at a meeting with Matt Leopold.

Please send this version forward to OAR political management for their review and for Anne's signature.

I am also attaching the incoming letter that you may want to include as well.

Thanks,

Susan Stahle
Air and Radiation Law Office
Office of General Counsel
U.S. Environmental Protection Agency
WJCN-7502B
202-564-1272

Message

From: Nelson, Karen [nelson.karen@epa.gov]
Sent: 11/14/2019 9:14:32 PM
To: Kim, Jung [Kim.Jung@epa.gov]; Larson, Ben [Larson.Ben@epa.gov]; Parsons, Nick [Parsons.Nick@epa.gov]; Michaels, Lauren [Michaels.Lauren@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]; McKenna, Chris [McKenna.Chris@epa.gov]; Piotrowski, Greg [piotrowski.greg@epa.gov]; Spencer, Mark [spencer.mark@epa.gov]
CC: Weihrauch, John [Weihrauch.John@epa.gov]; Caballero, Kathryn [Caballero.Kathryn@epa.gov]
Subject: DPP&CBI: Memo to the record for the RIN Vintage Letter
Attachments: CONFIDENTIAL_2019.08.13_Small Refinery Owners Letter.pdf

<!--[if lte mso 15 || CheckWebRef]-->

Nelson, Karen has shared OneDrive for Business files with you. To view them, click the links below.



Memo re. Refinery Compliance Demonstration for 2018 RIN Vintage Letter_DRAFT.docx



Sue's Edits_Clean DRAFT_Response Denying New Vintage RINs for 2018 SRE decisions.docx

<!--[endif]-->

Hi Team!

Here is the draft of the memo to the record memorializing the sources of information for the appendix of the response letter to Perkins Coie. I provided a short write up at the beginning to put Jung's table into context a bit.

I've attached the memo to the record for your review, along with the current version of the response letter (I believe Justin Schwab's comments still need to be added into it) and the incoming letter for reference.

Thanks!

-Karen

Do not release without review. This email and any attached documents may contain information claimed as CBI, confidential attorney-client communications, privileged attorney work product, and/or privileged and confidential deliberative process material.

From: Kim, Jung <Kim.Jung@epa.gov>
Sent: Thursday, November 14, 2019 11:15 AM
To: Larson, Ben <Larson.Ben@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>
Cc: Weihrauch, John <Weihrauch.John@epa.gov>
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

Thanks Ben for your inputs!

Karen – For the last question, we may say that we manage the RIN transactions using EMTS and our compliance reports are stored in our secured server.

I'm adding John to this email chain.

Thanks,

Jung

From: Larson, Ben <Larson.Ben@epa.gov>
Sent: Thursday, November 14, 2019 11:05 AM
To: Kim, Jung <Kim.Jung@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

Ex. 5 Deliberative Process (DP)

From: Kim, Jung <Kim.Jung@epa.gov>
Sent: Thursday, November 14, 2019 10:50 AM
To: Nelson, Karen <nelson.karen@epa.gov>
Cc: Larson, Ben <Larson.Ben@epa.gov>
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

Hi Karen,

Please see my response in red below.
 I am adding Ben – anything I missed?

Thanks,

Jung

From: Nelson, Karen <nelson.karen@epa.gov>
Sent: Thursday, November 14, 2019 10:34 AM
To: Kim, Jung <Kim.Jung@epa.gov>
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

Hey Jung!

I'm drafting a short explanation of the information included in the table you sent around yesterday, and I've got a few follow-up questions:

Was all the information in the table taken from the refineries' RFS0303 report? Both RFS0303 (annual compliance report) and EMTS transactions

Other than received an exemption, what are some reasons why a refiner would resubmit its RFS0303 report? A refiner is required to submit attest engagement by June 1 following the submission of the annual compliance report (March 31). They may have discovered mis-calculation of annual gasoline volume during attest audit. Or it could be due to simple transposition error or any reporting error (incorrect company ID, compliance basis, report year, etc)

How does a refiner submit its RFS0303 report? Electronically via OTAQ DCFUEL Submission (<https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100UBBA.pdf>)

How do we maintain the information (in EMTS, in PDF format on a secure server, other)? **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP)

Once I've got that write-up done, I'll send it to you and the other for review before sending it to OGC.

Thanks!
 -Karen

From: Kim, Jung <Kim.Jung@epa.gov>
Sent: Wednesday, November 13, 2019 11:53 AM
To: Nelson, Karen <nelson.karen@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>;
Stahle, Susan <Stahle.Susan@epa.gov>
Cc: Weihrauch, John <Weihrauch.John@epa.gov>
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

Hi Karen,

Please find attached the appendix table with annual compliance report columns (Column F & G) and EMTS transaction (Column H & I). - New columns are highlighted.

Please note that we have sent an instruction for SRE RIN restore(un-retire) and annual compliance reporting re-submission on 8/12/2019.

The refiners have resubmitted the reports with the updated RVO (zero) and deficit (zero) after 8/12.

Please review the table and let me know if you have any questions or concerns.
I will send a password separately.

Thanks,

Jung

From: Nelson, Karen <nelson.karen@epa.gov>
Sent: Wednesday, November 13, 2019 9:24 AM
To: Kim, Jung <Kim.Jung@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>
Cc: Weihrauch, John <Weihrauch.John@epa.gov>
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

I thought that may be the case, particularly for RIN retirement dates. Thanks for adding those in! I do think it will be useful to include those dates the record.
-Karen

From: Kim, Jung <Kim.Jung@epa.gov>
Sent: Wednesday, November 13, 2019 9:10 AM
To: Nelson, Karen <nelson.karen@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>;
Stahle, Susan <Stahle.Susan@epa.gov>
Cc: Weihrauch, John <Weihrauch.John@epa.gov>
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

Sure, I can add the dates but please keep in mind that a refiner can re-submit the reports (I will enter the resubmissions dates as well). As for the EMTS, I will check the dates but they can retire the RINs on various dates before to the compliance deadline (March 31).

Thanks,

Jung

From: Nelson, Karen <nelson.karen@epa.gov>
Sent: Wednesday, November 13, 2019 8:49 AM

To: Kim, Jung <Kim.Jung@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>
Cc: Weihrauch, John <Weihrauch.John@epa.gov>
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

Thanks Jung! I think this looks good, but I'm adding Sue to this email chain to make sure this fits what she has in mind, as well.

I also have one comment: could you add in dates for when the annual compliance report was submitted and when, if at all, RINs were retired for the various refineries? I don't know the level complication that this may add, so please let me know if there are many various dates for RIN retirement, for example.

Thanks!
 -Karen

From: Kim, Jung <Kim.Jung@epa.gov>
Sent: Tuesday, November 12, 2019 5:16 PM
To: Nelson, Karen <nelson.karen@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>
Cc: Weihrauch, John <Weihrauch.John@epa.gov>
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

Thanks Karen,

I haven't finished yet but just wanted to check if you are okay with my approach.
 There is a field in our annual compliance report for RFS (RFS0303) where user enter their deficit RVO carried over into the next year.

I will use this field and their RVO field to confirm their compliance demonstration status. (Partial, Full deficit or Fully complied).

Then, I will review their EMTS transaction for 2018 to see if they have used any RINs to demonstrate compliance.

Please see table below. I have added two additional columns- highlighted in yellow. If you are okay with this approach, I will be able to finish it tomorrow .

Refinery	Company ID	2018 Exemption Status	2018 Compliance Demonstration ^a	RINs Used to Demonstrate Compliance	Addressed By This Response?	Prior to SRE, a refiner submitted an annual compliance report(RFS0303) indicating that there is a deficit RVO	EMTS RINs Retired for compliance?
		Exempt	Partial deficit	2018	Yes	Yes - Partial Deficit	Yes - 2018 RINs used to meet the partial RVO
		Exempt	Full deficit	n/a	No	Yes - Full deficit	NO - EMTS Retire Transaction

.

.

Thanks,

Jung

From: Nelson, Karen <nelson.karen@epa.gov>
Sent: Tuesday, November 12, 2019 3:09 PM
To: Kim, Jung <Kim.Jung@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>
Cc: Weihrauch, John <Weihrauch.John@epa.gov>
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

Hi Jung!

Attached is the most recent version of the letter that I have. I do know that Justin Schwab in OGC had comments, but I don't think those have been incorporated here yet.

What we need is a factual write-up describing how we know what is stated in the letter's appendix about the various small refineries' compliance demonstrations to be true. We only need this to be done for the refineries listed in the letter's appendix, and not for all small refineries. If you have additional questions, my number is 734-214-4657 and I'll be at my desk for basically the rest of today. Or feel free to email, too! ☺

Thanks!
-Karen

From: Kim, Jung <Kim.Jung@epa.gov>
Sent: Tuesday, November 12, 2019 2:27 PM
To: Cohen, Janet <cohen.janet@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>
Cc: Weihrauch, John <Weihrauch.John@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

Great, thanks Janet!

Karen- Could you please send me the most current version of the letter?

Thanks,

Jung

From: Cohen, Janet <cohen.janet@epa.gov>
Sent: Tuesday, November 12, 2019 2:25 PM
To: Kim, Jung <Kim.Jung@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>
Cc: Weihrauch, John <Weihrauch.John@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

Thanks Jung!! Really appreciate it. What we are looking for is confirmation that the numbers of refineries we cite in the letter match our EMTS records. Yes, please work directly with Karen as she can point you to the most current version of the letter. -j. -

From: Kim, Jung <Kim.Jung@epa.gov>
Sent: Tuesday, November 12, 2019 2:12 PM
To: Cohen, Janet <cohen.janet@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>
Cc: Weihrauch, John <Weihrauch.John@epa.gov>
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

Sure I can help. I just need some clarification. Should I work directly with Karen?

Thanks,

Jung

From: Cohen, Janet <cohen.janet@epa.gov>
Sent: Tuesday, November 12, 2019 2:04 PM
To: Kim, Jung <Kim.Jung@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>
Cc: Weihrauch, John <Weihrauch.John@epa.gov>
Subject: help requested: DPP: Memo to the record for the RIN Vintage Letter

Jung, any chance you could help out with this? Or if not maybe Ben? - j. -

From: Nelson, Karen <nelson.karen@epa.gov>
Sent: Thursday, November 07, 2019 11:43 AM
To: Cohen, Janet <cohen.janet@epa.gov>; McKenna, Chris <McKenna.Chris@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Spencer, Mark <spencer.mark@epa.gov>
Cc: Stahle, Susan <Stahle.Susan@epa.gov>
Subject: DPP: Memo to the record for the RIN Vintage Letter

Hi Team,

Sue and David Orlin have been editing the "No New RINs" letter we're drafting to send to Perkins Coie, and so I believe it is very near to being ready for final review. Before we can send that letter, we need to have the memo for the record that documents the compliance information we cite to in the Appendix of the letter. I was wondering if we had a volunteer for that project already?

Thanks!
-Karen

Thank you for your time.

Sincerely,
Karen Nelson
Compliance Division
(734) 214-4657

Do not release without review. This email and any attached documents may contain information claimed as CBI, confidential attorney-client communications, privileged attorney work product, and/or privileged and confidential deliberative process material.

Message

From: Kim, Jung [Kim.Jung@epa.gov]
Sent: 11/13/2019 4:53:18 PM
To: Nelson, Karen [nelson.karen@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]; Larson, Ben [Larson.Ben@epa.gov]; Stahle, Susan [Stahle.Susan@epa.gov]
CC: Weihrauch, John [Weihrauch.John@epa.gov]
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter
Attachments: SRE_Memo.xlsx

Hi Karen,

Please find attached the appendix table with annual compliance report columns (Column F & G) and EMTS transaction (Column H & I). - New columns are highlighted.

Please note that we have sent an instruction for SRE RIN restore(un-retire) and annual compliance reporting re-submission on 8/12/2019.

The refiners have resubmitted the reports with the updated RVO (zero) and deficit (zero) after 8/12.

Please review the table and let me know if you have any questions or concerns.
 I will send a password separately.

Thanks,

Jung

From: Nelson, Karen <nelson.karen@epa.gov>
Sent: Wednesday, November 13, 2019 9:24 AM
To: Kim, Jung <Kim.Jung@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>
Cc: Weihrauch, John <Weihrauch.John@epa.gov>
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

I thought that may be the case, particularly for RIN retirement dates. Thanks for adding those in! I do think it will be useful to include those dates the record.
 -Karen

From: Kim, Jung <Kim.Jung@epa.gov>
Sent: Wednesday, November 13, 2019 9:10 AM
To: Nelson, Karen <nelson.karen@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>
Cc: Weihrauch, John <Weihrauch.John@epa.gov>
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

Sure, I can add the dates but please keep in mind that a refiner can re-submit the reports (I will enter the resubmissions dates as well). As for the EMTS, I will check the dates but they can retire the RINs on various dates before to the compliance deadline (March 31).

Thanks,

Jung

From: Nelson, Karen <nelson.karen@epa.gov>
Sent: Wednesday, November 13, 2019 8:49 AM
To: Kim, Jung <Kim.Jung@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>
Cc: Weihrauch, John <Weihrauch.John@epa.gov>
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

Thanks Jung! I think this looks good, but I'm adding Sue to this email chain to make sure this fits what she has in mind, as well.

I also have one comment: could you add in dates for when the annual compliance report was submitted and when, if at all, RINs were retired for the various refineries? I don't know the level complication that this may add, so please let me know if there are many various dates for RIN retirement, for example.

Thanks!
 -Karen

From: Kim, Jung <Kim.Jung@epa.gov>
Sent: Tuesday, November 12, 2019 5:16 PM
To: Nelson, Karen <nelson.karen@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>
Cc: Weihrauch, John <Weihrauch.John@epa.gov>
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

Thanks Karen,

I haven't finished yet but just wanted to check if you are okay with my approach.
 There is a field in our annual compliance report for RFS (RFS0303) where user enter their deficit RVO carried over into the next year.

I will use this field and their RVO field to confirm their compliance demonstration status. (Partial, Full deficit or Fully complied).

Then, I will review their EMTS transaction for 2018 to see if they have used any RINs to demonstrate compliance.

Please see table below. I have added two additional columns- highlighted in yellow. If you are okay with this approach, I will be able to finish it tomorrow .

Refinery	Company ID	2018 Exemption Status	2018 Compliance Demonstration ^a	RINs Used to Demonstrate Compliance	Addressed By This Response?	Prior to SRE, a refiner submitted an annual compliance report(RFS0303) indicating that there is a deficit RVO	EMTS RINs Retired for compliance?
		Exempt	Partial deficit	2018	Yes	Yes - Partial Deficit	Yes - 2018 RINs used to meet the partial RVO

		Exempt	Full deficit	n/a	No	Yes - Full deficit	NO - EMTS Retire Transaction
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Thanks,

Jung

From: Nelson, Karen <nelson.karen@epa.gov>
Sent: Tuesday, November 12, 2019 3:09 PM
To: Kim, Jung <Kim.Jung@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>
Cc: Weihrauch, John <Weihrauch.John@epa.gov>
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

Hi Jung!

Attached is the most recent version of the letter that I have. I do know that Justin Schwab in OGC had comments, but I don't think those have been incorporated here yet.

What we need is a factual write-up describing how we know what is stated in the letter's appendix about the various small refineries' compliance demonstrations to be true. We only need this to be done for the refineries listed in the letter's appendix, and not for all small refineries. If you have additional questions, my number is 734-214-4657 and I'll be at my desk for basically the rest of today. Or feel free to email, too! ☺

Thanks!
-Karen

From: Kim, Jung <Kim.Jung@epa.gov>
Sent: Tuesday, November 12, 2019 2:27 PM
To: Cohen, Janet <cohen.janet@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>
Cc: Weihrauch, John <Weihrauch.John@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

Great, thanks Janet!

Karen- Could you please send me the most current version of the letter?

Thanks,

Jung

From: Cohen, Janet <cohen.janet@epa.gov>
Sent: Tuesday, November 12, 2019 2:25 PM
To: Kim, Jung <Kim.Jung@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>
Cc: Weihrauch, John <Weihrauch.John@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

Thanks Jung!! Really appreciate it. What we are looking for is confirmation that the numbers of refineries we cite in the letter match our EMTS records. Yes, please work directly with Karen as she can point you to the most current version of the letter. - j. -

From: Kim, Jung <Kim.Jung@epa.gov>
Sent: Tuesday, November 12, 2019 2:12 PM
To: Cohen, Janet <cohen.janet@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>
Cc: Weihrauch, John <Weihrauch.John@epa.gov>
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

Sure I can help. I just need some clarification. Should I work directly with Karen?

Thanks,

Jung

From: Cohen, Janet <cohen.janet@epa.gov>
Sent: Tuesday, November 12, 2019 2:04 PM
To: Kim, Jung <Kim.Jung@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>
Cc: Weihrauch, John <Weihrauch.John@epa.gov>
Subject: help requested: DPP: Memo to the record for the RIN Vintage Letter

Jung, any chance you could help out with this? Or if not maybe Ben? - j. -

From: Nelson, Karen <nelson.karen@epa.gov>
Sent: Thursday, November 07, 2019 11:43 AM
To: Cohen, Janet <cohen.janet@epa.gov>; McKenna, Chris <McKenna.Chris@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Spencer, Mark <spencer.mark@epa.gov>
Cc: Stahle, Susan <Stahle.Susan@epa.gov>
Subject: DPP: Memo to the record for the RIN Vintage Letter

Hi Team,

Sue and David Orlin have been editing the "No New RINs" letter we're drafting to send to Perkins Coie, and so I believe it is very near to being ready for final review. Before we can send that letter, we need to have the memo for the record that documents the compliance information we cite to in the Appendix of the letter. I was wondering if we had a volunteer for that project already?

Thanks!
 -Karen

Thank you for your time.

Sincerely,
 Karen Nelson
 Compliance Division
 (734) 214-4657

Do not release without review. This email and any attached documents may contain information claimed as CBI, confidential attorney-client communications, privileged attorney work product, and/or privileged and confidential deliberative process material.

Message

From: Nelson, Karen [nelson.karen@epa.gov]
Sent: 12/16/2019 10:15:43 PM
To: Bunker, Byron [bunker.byron@epa.gov]
CC: Cohen, Janet [cohen.janet@epa.gov]; Manners, Mary [manners.mary@epa.gov]; Hengst, Benjamin [Hengst.Benjamin@epa.gov]; Le, Madison [Le.Madison@epa.gov]; Caballero, Kathryn [Caballero.Kathryn@epa.gov]
Subject: RE: 2 RFS letters to be signed next week - comments from Justin

<!--[if lte mso 15 || CheckWebRef]-->

Nelson, Karen has shared OneDrive for Business files with you. To view them, click the links below.

Ex. 4 CBI

 2019.12.16_Vintage RIN Letter_Final.docx

<!--[endif]-->

I used Sue's suggested edits below, and accepted Justin's grammar and punctuation edits in the RIN Vintage letter.

These are now clean versions. I saved each in its respective online location.

Thanks!
 -Karen

From: Bunker, Byron <bunker.byron@epa.gov>
Sent: Monday, December 16, 2019 4:55 PM
To: Nelson, Karen <nelson.karen@epa.gov>
Cc: Cohen, Janet <cohen.janet@epa.gov>; Manners, Mary <manners.mary@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Le, Madison <Le.Madison@epa.gov>; Caballero, Kathryn <Caballero.Kathryn@epa.gov>
Subject: FW: 2 RFS letters to be signed next week - comments from Justin

Hi Karen,

Please see the e-mail chain below and Sue's suggested edits to address Justin's comments. I have reviewed Justin's comments and believe that Sue's suggestions work well. Can you please review, and assuming you concur, create final versions of these documents which we can then send bag to Ben Hengst for hopefully final approval from OAR?

Thanks,

Byron

Byron Bunker
 Director Compliance Division
 Office of Transportation and Air Quality
 Environmental Protection Agency
 2000 Traverwood Drive
 Ann Arbor, MI 48105
Bunker.Byron@epa.gov
 Phone: (734) 214-4155

Ex. 6 Personal Privacy (PP)

From: Stahle, Susan <Stahle.Susan@epa.gov>
Sent: Monday, December 16, 2019 2:49 PM
To: Bunker, Byron <bunker.byron@epa.gov>
Cc: Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>
Subject: FW: 2 RFS letters to be signed next week - comments from Justin

Byron –

Attached are some minor comments from Justin on these letters. David Fotouhi had no further comments.

Ultimately, OGC is happy to defer to OAR on how you want to address these comments. In case it is helpful, here are some suggestions.

Ex. 4 CBI / Ex. 5 Deliberative Process

To address Justin's comment on the vintage RIN letter, **Ex. 4 CBI / Ex. 5 Deliberative Process**

Ex. 4 CBI / Ex. 5 Deliberative Process

We hope that helps. We do not need to see these again and will leave them with you to move forward for signature.

Thanks,

Susan Stahle
 Air and Radiation Law Office
 Office of General Counsel
 U.S. Environmental Protection Agency
 WJCN-7502B
 202-564-1272

From: Schwab, Justin <Schwab.Justin@epa.gov>
Sent: Sunday, December 15, 2019 1:08 PM
To: Orlin, David <Orlin.David@epa.gov>; Fotouhi, David <Fotouhi.David@epa.gov>
Cc: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Okoye, Winifred <Okoye.Winifred@epa.gov>
Subject: RE: 2 RFS letters to be signed next week

Please find attached.

Minor stylistic redline and one bubble asking for more expansion on the SRE letter; one area flagged for expansion/clarification on the **Ex. 4 CBI**

This is likely to be my last substantive engagement not just on RFS or Title II but really across the board. David Fotouhi, pending further announcement, should be the go-to person in OGC IO for the time being.

From: Orlin, David <Orlin.David@epa.gov>

Sent: Thursday, December 12, 2019 1:52 PM

To: Schwab, Justin <Schwab.Justin@epa.gov>; Fotouhi, David <Fotouhi.David@epa.gov>

Cc: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Okoye, Winifred <Okoye.Winifred@epa.gov>

Subject: 2 RFS letters to be signed next week

Justin and David,

As you may know, OAR is planning to send out two RFS-related letters next week, contemporaneous with the 2020 annual rule signing—one a response to counsel for a number of small refineries on “vintage RINs” and the other a response to **Ex. 4 CBI**. Justin has seen the vintage RIN letter a couple times before, and the **Ex. 4 CBI** letter is fairly straightforward, but if you have comments or would like additional time to review the letters, please let us know by COB on Monday. David Harlow has also seen an earlier version of the vintage letter, but OTAQ will get his signoff on the drafts of both letters before putting them in for signature. I have provided a brief summary below.

Ex. 4 CBI

The vintage RIN letter is a response to a number of small refineries who received small refinery exemptions after the compliance deadline for 2018, but object to the form of relief they received. The small refineries would like EPA to issue them current year RINs in place of simply refunding back to them the RINs they used for compliance (some of which had expired). The letter explains EPA’s view that a small refinery exemption removes the need for a small refinery to comply with RFS standards, and returning any RINs that have been retired is the appropriate result of those RINs no longer being needed for compliance. The letter also includes a number of reasons why EPA believes giving small refineries current year RINs in these circumstances would be inappropriate and inconsistent with Congressional intent. The letter notes that we have given current year RINs to a small refinery following adverse litigation on a small refinery exemption denial but concludes that is extraordinary relief limited to those circumstances.

If you have any questions or comments, or need more time or background information, please let us know.

David Orlin
U.S. EPA, Office of General Counsel
(202) 564-1222

Message

From: Hengst, Benjamin [Hengst.Benjamin@epa.gov]
Sent: 12/16/2019 10:09:47 PM
To: Le, Madison [Le.Madison@epa.gov]
CC: Bunker, Byron [bunker.byron@epa.gov]; Nelson, Karen [nelson.karen@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]; Manners, Mary [manners.mary@epa.gov]; Caballero, Kathryn [Caballero.Kathryn@epa.gov]; McKenna, Chris [McKenna.Chris@epa.gov]
Subject: Re: 2 RFS letters to be signed next week - comments from Justin

Plan is still to issue both on Thursday — I confirmed with OAR today.

We can talk at our fuels weekly tomorrow about details. Ben

On Dec 16, 2019, at 5:08 PM, Le, Madison <Le.Madison@epa.gov> wrote:

Adding Chris McKenna for the Ex. 4 CBI response.

From: Bunker, Byron <bunker.byron@epa.gov>
Sent: Monday, December 16, 2019 4:55 PM
To: Nelson, Karen <nelson.karen@epa.gov>
Cc: Cohen, Janet <cohen.janet@epa.gov>; Manners, Mary <manners.mary@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Le, Madison <Le.Madison@epa.gov>; Caballero, Kathryn <Caballero.Kathryn@epa.gov>
Subject: FW: 2 RFS letters to be signed next week - comments from Justin

Hi Karen,

Please see the e-mail chain below and Sue's suggested edits to address Justin's comments. I have reviewed Justin's comments and believe that Sue's suggestions work well. Can you please review, and assuming you concur, create final versions of these documents which we can then send bag to Ben Hengst for hopefully final approval from OAR?

Thanks,

Byron

Byron Bunker
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 Office of Transportation and Air Quality
 Environmental Protection Agency
 2000 Traverwood Drive
 Ann Arbor, MI 48105
Bunker.Byron@epa.gov
 Phone: (734) 214-4155

Ex. 6 Personal Privacy (PP)

From: Stahle, Susan <Stahle.Susan@epa.gov>
Sent: Monday, December 16, 2019 2:49 PM
To: Bunker, Byron <bunker.byron@epa.gov>
Cc: Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>
Subject: FW: 2 RFS letters to be signed next week - comments from Justin

Byron –

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Ultimately, OGC is happy to defer to OAR on how you want to address these comments. In case it is helpful, here are some suggestions.

Ex. 4 CBI / Ex. 5 Deliberative Process

To address Justin's comment on the vintage RIN letter, Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

We hope that helps. We do not need to see these again and will leave them with you to move forward for signature.

Thanks,

Susan Stahle
 Air and Radiation Law Office
 Office of General Counsel
 U.S. Environmental Protection Agency
 WJCN-7502B
 202-564-1272

From: Schwab, Justin <Schwab.Justin@epa.gov>
Sent: Sunday, December 15, 2019 1:08 PM
To: Orlin, David <Orlin.David@epa.gov>; Fotouhi, David <Fotouhi.David@epa.gov>
Cc: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Okoye, Winifred <Okoye.Winifred@epa.gov>
Subject: RE: 2 RFS letters to be signed next week

Please find attached.

Minor stylistic redline and one bubble asking for more expansion on the SRE letter; one area flagged for expansion/clarification on the Ex. 4 CBI

This is likely to be my last substantive engagement not just on RFS or Title II but really across the board. David Fotouhi, pending further announcement, should be the go-to person in OGC IO for the time being.

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Sent: Thursday, December 12, 2019 1:52 PM

To: Schwab, Justin <Schwab.Justin@epa.gov>; Fotouhi, David <Fotouhi.David@epa.gov>

Cc: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>;

Stahle, Susan <Stahle.Susan@epa.gov>; Okoye, Winifred <Okoye.Winifred@epa.gov>

Subject: 2 RFS letters to be signed next week

Justin and David,

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If you have any questions or comments, or need more time or background information, please let us know.

David Orlin
U.S. EPA, Office of General Counsel
(202) 564-1222

<EDIT 2019.12.12 Vintage RIN Letter.docx>

Ex. 4 CBI

Message

From: Le, Madison [Le.Madison@epa.gov]
Sent: 12/16/2019 10:08:33 PM
To: Bunker, Byron [bunker.byron@epa.gov]; Nelson, Karen [nelson.karen@epa.gov]
CC: Cohen, Janet [cohen.janet@epa.gov]; Manners, Mary [manners.mary@epa.gov]; Hengst, Benjamin [Hengst.Benjamin@epa.gov]; Caballero, Kathryn [Caballero.Kathryn@epa.gov]; McKenna, Chris [McKenna.Chris@epa.gov]
Subject: RE: 2 RFS letters to be signed next week - comments from Justin
Attachments: EDIT 2019.12.12_Vintage RIN Letter.docx; **Ex. 4 CBI**

Adding Chris McKenna for the **Ex. 4 CBI** response.

From: Bunker, Byron <bunker.byron@epa.gov>
Sent: Monday, December 16, 2019 4:55 PM
To: Nelson, Karen <nelson.karen@epa.gov>
Cc: Cohen, Janet <cohen.janet@epa.gov>; Manners, Mary <manners.mary@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Le, Madison <Le.Madison@epa.gov>; Caballero, Kathryn <Caballero.Kathryn@epa.gov>
Subject: FW: 2 RFS letters to be signed next week - comments from Justin

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 Director Compliance Division
 Office of Transportation and Air Quality
 Environmental Protection Agency
 2000 Traverwood Drive
 Ann Arbor, MI 48105
Bunker.Byron@epa.gov
 Phone: (734) 214-4155

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Cc: Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>
Subject: FW: 2 RFS letters to be signed next week - comments from Justin

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To address Justin's comment on the vintage RIN letter, **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP)

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Air and Radiation Law Office
Office of General Counsel
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WJCN-7502B
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Sent: Sunday, December 15, 2019 1:08 PM
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Cc: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Okoye, Winifred <Okoye.Winifred@epa.gov>
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David Orlin
U.S. EPA, Office of General Counsel
(202) 564-1222

Message

From: Stahle, Susan [Stahle.Susan@epa.gov]
Sent: 12/16/2019 7:49:13 PM
To: Bunker, Byron [bunker.byron@epa.gov]
CC: Hengst, Benjamin [Hengst.Benjamin@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]; Orlin, David [Orlin.David@epa.gov]; Dubey, Susmita [dubey.susmita@epa.gov]
Subject: FW: 2 RFS letters to be signed next week - comments from Justin
Attachments: EDIT 2019.12.12_Vintage RIN Letter.docx; **Ex. 4 CBI**

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Subject: RE: 2 RFS letters to be signed next week

Please find attached.

Minor stylistic redline and one bubble asking for more expansion on the SRE letter; one area flagged for expansion/clarification on the **Ex. 4 CBI**

This is likely to be my last substantive engagement not just on RFS or Title II but really across the board. David Fotouhi, pending further announcement, should be the go-to person in OGC IO for the time being.

From: Orlin, David <Orlin.David@epa.gov>

Sent: Thursday, December 12, 2019 1:52 PM

To: Schwab, Justin <Schwab.Justin@epa.gov>; Fotouhi, David <Fotouhi.David@epa.gov>

Cc: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Okoye, Winifred <Okoye.Winifred@epa.gov>

Subject: 2 RFS letters to be signed next week

Justin and David,

As you may know, OAR is planning to send out two RFS-related letters next week, contemporaneous with the 2020 annual rule signing—one a response to counsel for a number of small refineries on “vintage RINs” and the other a response to **Ex. 4 CBI**. Justin has seen the vintage RIN letter a couple times before, and the **Ex. 4 CBI** letter is fairly straightforward, but if you have comments or would like additional time to review the letters, please let us know by COB on Monday. David Harlow has also seen an earlier version of the vintage letter, but OTAQ will get his signoff on the drafts of both letters before putting them in for signature. I have provided a brief summary below.

Ex. 4 CBI

The vintage RIN letter is a response to a number of small refineries who received small refinery exemptions after the compliance deadline for 2018, but object to the form of relief they received. The small refineries would like EPA to issue them current year RINs in place of simply refunding back to them the RINs they used for compliance (some of which had expired). The letter explains EPA’s view that a small refinery exemption removes the need for a small refinery to comply with RFS standards, and returning any RINs that have been retired is the appropriate result of those RINs no longer being needed for compliance. The letter also includes a number of reasons why EPA believes giving small refineries current year RINs in these circumstances would be inappropriate and inconsistent with Congressional intent. The letter notes that we have given current year RINs to a small refinery following adverse litigation on a small refinery exemption denial but concludes that is extraordinary relief limited to those circumstances.

If you have any questions or comments, or need more time or background information, please let us know.

David Orlin
U.S. EPA, Office of General Counsel
(202) 564-1222

Message

From: Pugliese, Holly [pugliese.holly@epa.gov]
Sent: 6/24/2019 7:40:41 PM
To: Cohen, Janet [cohen.janet@epa.gov]
Subject: RE: SRE FOIA & pending inquiry status
Attachments: AX-18-000-3818_RFA draft response.docx; 18-000-3818.pdf; 19-000-2225.pdf; 18-000-4709.pdf; 19-000-5054 SRE.pdf; 19-000-4752 SRE.pdf

Hi Janet. By my count, I have 5 controls on SRE in my CMS box. Three are older and below is text of yours from a previous email with your take on them. 5054 and 4752 are newer ones from late April that I believe I sent to you, but if not they are attached here as well.

Let me know if you need anything else from me.

Ex. 5 Deliberative Process (DP)

Holly Pugliese
 Office of Transportation and Air Quality
 US EPA
 pugliese.holly@epa.gov

From: Cohen, Janet
Sent: Monday, June 24, 2019 3:18 PM
To: Meekins, Tanya <Meekins.Tanya@epa.gov>; Pugliese, Holly <pugliese.holly@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Garfinkle, Stacey <garfinkle.stacey@epa.gov>; Burch, Julia <Burch.Julia@epa.gov>
Cc: Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Subject: SRE FOIA & pending inquiry status

All – I’m putting a discussion about status of pending FOIAs (and other controls or inquiries) on the agenda for tomorrow’s club meeting. With several key players out this week we may not make much progress, but my goal is to get as close as we can to a complete list of all pending inquiries, along with their status (including, if we’re sitting on something, what we’re waiting for). So I’m asking the rest of us to please search through your memory or files and share what you know. I just checked sharepoint – there’s a FOIA list that indicates which are part of the RFA lawsuit, but doesn’t say anything about the others. The most recent non-FOIA correspondence list was last updated in September, 2018.

- J. -

Thu Jan 25 09:28:40 EST 2018
CMS.OEX@epamail.epa.gov
FW: RFA letter on small refinery exemption
To: "cms.oex@domino.epamail.epa.gov" <cms.oex@domino.epamail.epa.gov>

From: Hope, Brian
Sent: Thursday, January 25, 2018 2:28:38 PM (UTC+00:00) Monrovia, Reykjavik
To: CMS.OEX
Subject: FW: RFA letter on small refinery exemption

From: Rachel Gantz [mailto:rgantz@ethanolrfa.org]
Sent: Wednesday, January 24, 2018 1:41 PM
To: Pruitt, Scott <Pruitt.Scott@epa.gov>
Cc: Argyropoulos, Paul <Argyropoulos.Paul@epa.gov>; Wehrum, Bill <Wehrum.Bill@epa.gov>; Jackson, Ryan <jackson.ryan@epa.gov>; Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>
Subject: RFA letter on small refinery exemption

Administrator Pruitt,

On behalf of Renewable Fuels Association President and CEO Bob Dinneen, I would like to submit the attached letter on EPA’s small refinery exemption under the RFS.

Thank you.

Rachel Gantz
Communications Director
Renewable Fuels Association
425 3rd St., SW, Suite 1150
Washington, D.C. 20024
202-315-2453 (direct)
rgantz@ethanolrfa.org
Twitter: racheldgantz



January 24, 2018

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W., 1101A
Washington, DC 20460

Re: Small Refiner Exemptions

Dear Administrator Pruitt:

I am writing to express the Renewable Fuels Association's concern regarding a lack of transparency surrounding the Environmental Protection Agency's ("EPA's") implementation of the small refinery exemption in the Renewable Fuels Standard ("RFS") program. This lack of transparency is particularly disconcerting given that an ill-conceived and unauthorized expansion of this exemption could destabilize the market for renewable fuels and undermine Congress's goals for the RFS program. I would also like to express our concern with the market destabilizing impacts of EPA's failure to require non-exempt obligated parties to make up the volume of fuel that the exempt small refiners would have otherwise provided in a given year.

EPA Criteria for Small Refiner Applications

As you know, when Congress enacted this program as part of the Energy Policy Act of 2005, it provided a temporary exemption from RFS requirements to refineries if they had a crude throughput of no more than 75,000 barrels of crude per day and could that participation in the RFS program would lead to a "disproportionate economic hardship."¹ EPA evaluates these petitions on a case-by case basis, after consulting with the Department of Energy, and allows small refiners to petition for an extension of their exemption based on essentially the same showing. 40 CFR 80.1441(e)(2). Although EPA has indicated that it has evaluated a dozen petitions for exemption for 2016, we are not aware of any instance in which EPA has been willing to disclose any data about the total number of petitions it received and granted for subsequent years, including 2018.²

EPA recently indicated that a Congressional directive to follow the Department of Energy's recommendations for exemptions "could impact how EPA evaluates small refinery hardship petitions *and the number and magnitude of exemptions granted.*"³ It would be disappointing, to say the least, if EPA now began to increase the number and magnitude of exemptions granted, a decade after the program began. As the American

¹ 42 U.S.C. §§ 7545(o)(1)(K), (o)(9)(B).

² 82 Fed. Reg. 34,206, 34,244 (July 21, 2017).

³ 82 Fed. Reg. 34,242 (July 21, 2017) (emphasis added).

Petroleum Institute echoed in its recent comments, “refiners have had ample time to adjust their businesses to operate under the burden of the RFS.”⁴

Although we understand that the number of small refinery petitions may increase in light of the Tenth Circuit’s decision in *Sinclair Wyoming Refining Co. v. EPA*,⁵ EPA has yet to give an indication of how it will adjust its perspective on reviewing and processing such petitions. As EPA reevaluates its position of what constitutes a “disproportionate economic hardship” to a small refinery, we hope that EPA will remain true to its previous determination in the 2017 Final Rule that “obligated parties, including small entities, are generally recovering the cost of acquiring the credits...necessary for compliance with the RFS standards through higher sales prices of the petroleum products they sell.”⁶

EPA’s finding also accords with statements from the American Petroleum Institute, which cautioned that exempt small refiners could unfairly reap windfall profits from the selling of RINs they no longer need.⁷

EPA also stated that it found that the RFS “standards will not have a significant economic impact on a substantial number of small entities” – in fact, even when EPA considered “the extreme scenario where a refiner obtained the RINs necessary for compliance by purchasing separated RINs and did not recover any of the RIN costs through higher prices for the petroleum products sold, the cost to sales ratio was 0.32%.”⁸

Although EPA has confirmed in its Response to Comments to the 2018 RVO Final Rule that the Agency “is required to ensure that transportation fuel...contains the applicable volumes of renewable fuel,” EPA remains silent on the criteria it will use to evaluate small refinery hardship petitions and any appropriate changes to the renewable volume obligations of non-exempt obligated parties.⁹ RFA requests a productive dialogue on this issue between EPA and the renewable fuels industry. The specific topics we would propose include the following:

- Whether and how the criteria to approve an exemption request that EPA described in its Dec. 6, 2016 memorandum will be amended in light of the *Sinclair Refining* decision;

⁴ American Petroleum Institute, *Comments Re: EPA–HQ–OAR–2017–0091 Proposed Rule: Renewable Fuel Standard Program: Standards for 2018 and Biomass-based Diesel Volume for 2019* (Aug. 31, 2017) 2.

⁵ See 874 F.3d 1159, 1169-72 (Oct. 30, 2017) (amending opinion issued on August 15, 2017).

⁶ EPA, *Renewable Fuel Standard Program – Standards for 2018 and Biomass-Based Diesel Volume for 2019: Response to Comments* (Dec. 2016) 470.

⁷ American Petroleum Institute, *supra* note 5 (“To the extent that the costs of complying with the RFS program are included in the market value of products sold then an exempt party not subject to the same costs as their competitors is not avoiding a hardship, but rather is being provided with a windfall.”).

⁸ *Id.*

⁹ EPA, *Renewable Fuel Standard Program – Standards for 2018 and Biomass-Based Diesel Volume for 2019: Response to Comments*, (Dec. 2017) 216.

- Whether and to what circumstances EPA would consider departing from the Department of Energy's recommendation on a particular exemption request;
- Whether the Agency will confirm that any economic hardship asserted must be a *direct result* of RFS obligations and not general business factors that may impede a refinery's profitability;
- Whether EPA's Dec. 6, 2016 memorandum outlining financial and other information to be submitted as part of a small refinery exemption request will be updated in light of the recent developments described above;¹⁰
- When EPA will publicly disclose, on an ongoing basis, the number of small refinery exemptions granted in 2016, 2017 and subsequent years, and whether each of those small refinery volume reductions were accounted for in that year's or the subsequent year's applicable percentages;
- The number of pending small refinery hardship exemptions that are pending before EPA for 2018;
- The total capacity represented by small refineries with pending hardship exemption requests in 2018; and
- When and how EPA intends to communicate any changes in policy to small refiners, the renewable fuels industry, or other regulated parties.

Timing of Small Refiner Exemption Determinations

In the absence of clear guidance from EPA on whether or how it will now reinterpret "disproportionate economic hardship" and how it will factor in DOE recommendations, RFA is concerned that virtually any refiner with crude throughput of less than 75,000 barrels of crude per day could be granted the small refiner exemption -- roughly 10 percent of all domestic refining capacity.¹¹ To avoid such a market destabilizing scenario, EPA has to ensure that its review of exemption petitions remains discerning and that non-exempt obligated parties make up for any lost volumes of renewable fuels the exempt small refiners would have otherwise provided. Yet EPA has indicated in its 2018 RVO Final Rule that it will *not* adjust percentage standards for 2018 to account for any small refinery exemptions that are approved after the Final Rule,

¹⁰ Memorandum from Byron Bunker, U.S. EPA, Office of Air and Radiation, *Financial and Other Information to Be Submitted with 2016 RFS Small Refinery Hardship Exemption Requests* (Dec. 6, 2016).

¹¹ See 40 C.F.R. § 80.1405(c) (amount of fuel projected to be produced by exempt small refineries and small refiners is 11.9 percent (gasoline) and 15.2 percent (diesel); *see also* U.S. Energy Information Administration, *Annual Refinery Report*, figure 1 (June 21, 2017) (implying total capacity of small refineries is 9.9 percent).

meaning that any volumes attributable to exempt small refineries will effectively disappear from the RFS program in 2018.¹²

The net effect of the Agency's position, if numerous exemptions are granted, would be to reduce the volumetric RFS mandates outside of the public rulemaking process for establishing renewable volume obligations (RVOs). Refiners would still be complying with the fixed percentages in the Final Rule, but because fewer refiners would be complying, the total volumes of renewable fuels actually blended would drop below required levels. The renewable fuels industry is concerned that EPA's decision to not adjust percentage standards to account for any small refinery exemptions that are approved after an RVO Final Rule hinders its obligation to ensure that transportation fuel contains the required volumes of renewable fuel. As EPA acknowledged in its Response to Comments to the 2018 Final Rule, "CAA section 211(o)(3)(B)(i) requires that the percentage standards established by EPA ensure that the volume requirements are met."¹³

RFA has identified two possible solutions that would enable EPA to provide the certainty of a single annual percentage standard while also responding to its obligation to consider exemption requests. First, EPA could establish an annual cut-off date for the processing of any small refinery exemption petition to ensure that the agency has adequate time to take such exemptions into account in setting the annual percentage standards. If EPA is going to require non-exempt obligated parties to make up the volume of fuel that exempt small refineries would have otherwise provided in a given year only where the agency has sufficient time to reflect that exemption in the annual percentage standards, a small refiner should submit its exemption petition for the following calendar year no fewer than 90 days before EPA promulgates its Final Rule in November of each year (i.e., before July 1st of each year). Small refiner hardship petitions that EPA does not receive by July 1st should be considered eligible for an exemption only for the RVOs of the calendar year after the following year. Although exemption "petitions may be filed at any time ... EPA has discretion to determine the length of any exemption that may be granted in response."¹⁴ The statute requires EPA to act on the petition within 90 days of receipt, but the statute is silent on when the hardship exemption, if granted, must begin or end.¹⁵ This change in the processing of exemption petitions would allow EPA to account for gasoline and diesel from exempt small refineries when the exemption petition is submitted well after the RVOs and percentage standards for a given year have been finalized.

Second, as an alternative, EPA could continue granting hardship exemptions in the year that they are received but "true up" the percentage standards in the subsequent calendar year. This would require adjusting a given year's calculation to subtract the gasoline and diesel volumes produced by exempted small refineries in the prior year, if the small refiner submitted a hardship petition after EPA finalized previous year's RVO rule and those exempt small refiner volumes were thus not reflected in EPA's formula

¹² 82 Fed. Reg. 58,486, 58,523 (Dec. 12, 2017).

¹³ EPA, *supra* note 9.

¹⁴ 75 Fed. Reg. 14,670, 14,736 (Mar. 26, 2010).

¹⁵ 42 U.S.C. § 7545(o)(9)(B).

calculating the previous year's percentage standards. EPA has sufficient statutory authority to make this change because the statute does not dictate the formula EPA must use to determine the applicable percentage. Doing so would also help ensure the RFS's volume obligations are being met and would therefore comply with Congressional intent.¹⁶

The renewable fuels industry and obligated parties deserve greater clarity on the criteria EPA will apply to small refinery petitions going forward. We appreciate your previous statements in support of the continued success of the RFS program, and we look forward to working with you to address this important issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Bob Dinneen", with a stylized flourish at the end.

Bob Dinneen
President & CEO

¹⁶ 42 U.S.C. § 7545(o)(3)(B)(i) (stating that the Administrator shall determine an applicable percentage for the following calendar year that “ensures that the requirements [of the volume obligations in the Act] are met.”).

Thu Feb 22 13:07:23 EST 2018
CMS.OEX@epamail.epa.gov
FW: Small Refinery Hardship Under the Renewable Fuel Standard
To: "cms.oex@domino.epamail.epa.gov" <cms.oex@domino.epamail.epa.gov>

From: Hope, Brian
Sent: Thursday, February 22, 2018 6:07:22 PM (UTC+00:00) Monrovia, Reykjavik
To: CMS.OEX
Subject: FW: Small Refinery Hardship Under the Renewable Fuel Standard

From: Johnson Koch, LeAnn M. (Perkins Coie) [mailto:LeAnnJohnson@perkinscoie.com]
Sent: Wednesday, February 21, 2018 7:20 PM
To: Pruitt, Scott <Pruitt.Scott@epa.gov>; Wehrum, Bill <Wehrum.Bill@epa.gov>
Cc: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Dominguez, Alexander <dominguez.alexander@epa.gov>
Subject: Small Refinery Hardship Under the Renewable Fuel Standard

Dear Administrator Pruitt and Assistant Administrator Wehrum:

Attached is a letter from the Small Refiners Coalition concerning small refinery hardship relief under the Renewable Fuel Standard, responding to letters from the Renewable Fuels Association and the American Petroleum Institute.

Thank you for your consideration of SRC's views.

LeAnn Johnson Koch, on behalf of the Small Refiners Coalition

LeAnn Johnson Koch | Perkins Coie LLP

202.654.6209 (office)

202.253.8152 (mobile)

NOTICE: This communication may contain privileged or other confidential information. If you have received it in error, please advise the sender by reply email and immediately delete the message and any attachments without copying or disclosing the contents. Thank you.

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February 21, 2018

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VIA ELECTRONIC AND U.S. MAIL

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W., 1101A
Washington, DC 20460

The Honorable William Wehrum
Assistant Administrator
Office of Air and Radiation
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W., 1101A
Washington, DC 20460

Re: Small Refinery Hardship Under the Renewable Fuel Standard (“RFS”)

Dear Administrator Pruitt and Assistant Administrator Wehrum:

I am writing on behalf of the Small Refiners Coalition (“Coalition”) regarding the Renewable Fuels Association’s (“RFA”) January 24, 2018¹ and API’s February 12, 2018² letters concerning small refinery hardship under the RFS.

The Department of Energy, in a 2011 report for Congress, performed a detailed analysis of how the RFS program would evolve over time and cause harm to small refineries.³ As explained in the DOE study, small refinery hardship is caused by the increasing renewable fuel volume mandates (blendwall), the resulting increase in the price of RINs, and the inability of small refineries to position themselves to avoid the harm due to their lack of vertical integration, lack of market power, and capital constraints. Therefore, small refinery harm was expected to

¹ Letter from Renewable Fuels Association to Scott Pruitt, Administrator, U.S. EPA (Jan. 24, 2018) (<http://www.ethanolrfa.org/wp-content/uploads/2018/01/EPAsmallrefinerletterjanuary24-1.pdf>).

² Letter from American Petroleum Institute to William Wehrum, Assistant Administrator, U.S. EPA (Feb. 12, 2018) (<http://www.api.org/~media/Files/News/Letters-Comments/2017/API-Letter-2-12-18.pdf>).

³ U.S. Department of Energy, Small Refinery Exemption Study: An Investigation Into Disproportionate Economic Hardship (2011)(“DOE study”)(<https://www.epa.gov/sites/production/files/2016-12/documents/small-refinery-exempt-study.pdf>).

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grow worse over time, not diminish, as the volume mandates increased. As explained in the study:

The response to the RFS2 requirements depends in large measure on the size and scope of the operations of individual companies. Large integrated refiners can more easily obtain financing for blending facilities, generate options, accommodate their needs efficiently and shift emphasis from one sector to another as opportunities indicate. For example, over the past couple of years, compliance strategies for larger companies included engaging in joint ventures with ethanol producers, investing in companies in the renewable sector, or conducting research on renewable fuels. As a result, RFS2 compliance costs for the larger refiner may be a small part of overall operating costs.

Small companies are more limited in their options. They face a number of challenges and access to capital is generally limited or not available. Even when capital is available, they may have to choose between making substantial investments in blending and investing in other needed facilities to improve operating efficiencies to remain competitive.⁴

As predicted in the DOE Study, large integrated refiners have positioned themselves to respond to the increasing volume mandates by entering into joint ventures with biofuels producers and through their control of blending and retail. Fifty percent of retail outlets sell fuel under the brand of one of the 15 largest refiner-suppliers through supply agreements.⁵ These entities secure RINs because of the large amount of blending and retail they control. While RFA and API contend that small refineries “have had ample time to adjust their businesses to operate under the burden of the RFS,” small refineries would have to enter new business areas in other geographic areas to displace established, well-funded, long time market players from the wholesale and retail markets they control. This is not easily, cheaply or quickly accomplished and requires changing how these businesses operate.

More fundamentally, small refiners were never expected to make capital investments to avoid the harm caused by high-priced RINs. As EPA explained in the 2007 rulemaking, “obligated parties [would] be able to fulfill their renewable fuel obligation without having to make capital investments” and “sufficient RINs [would] be available and at reasonable prices.”⁶ These were the assumptions that were the foundation for EPA’s SBREFA analysis and EPA’s conclusion that small refineries would not be harmed.⁷ But the RIN market has not operated as

⁴ DOE Study at 23.

⁵ http://www.convenience.org/YourBusiness/FuelsReports/GasPrices_2013/Pages/WhoSellsGas.aspx

⁶ Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program, 72 Fed. Reg. 23900, 23926 (May 1, 2007).

⁷ “We have concluded that the final RFS rule will not have a significant impact on a substantial number of small entities. We based this conclusion on several criteria. First, the industry is expected to be overcomplying by a wide

The Honorable Scott Pruitt
 The Honorable William Wehrum
 VIA ELECTRONIC AND U.S. MAIL
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EPA intended. RIN prices have increased by 4-5000%, exempt distributor/retailer chains have retained windfall RIN revenues rather than investing in renewable fuel blending, retailers are “fuel agnostic” and unmotivated to sell higher ethanol blends,⁸ the RIN market has experienced unprecedented fraud, and distributor/retailers are lining their pockets instead of passing along RIN value to encourage E15/E85 use.⁹ Therefore, the market conditions are much worse than DOE expected when it concluded that small refineries could be significantly harmed.

Although they were not expected to do so, most small refineries have made investments to blend renewable fuel, but their investments have been displaced by exempt distributor/retailers. With the increase in the price of RINs since 2013, large distributor/retailers have made investments in blending in close proximity to small refinery racks, and then refused to buy blended fuel. The small refineries lost both their investments in rack blending and the RINs they had been generating for compliance. These examples are described in small refinery hardship petitions submitted to EPA. In addition, a now common practice in the industry is the capture of RIN value by large distributor/retailer chains by requiring discounts on the wholesale price of transportation fuel tied to the value of the RIN on the date of the sale. In requests for proposal and contracts with distributor/retailers provided to EPA through the hardship petition process, small refineries have demonstrated that even when they are able to make investments in renewable fuel blending, they cannot retain the RIN or the value of the RIN to reduce their RFS burden because of their lack of vertical integration (retail) and lack of market power.

API, citing an EPA study,¹⁰ contends that small refineries are not harmed by high RIN prices because large and small refineries are largely able to pass through their RIN costs. But the EPA study cited by API did not look at small refineries; it looked only at “merchant refineries.” As the DOE study explained, “the degree to which the costs burdening small refineries will be passed through to the market depends on many factors, including the market power and relative cost level of a small refinery relative to other market participants.”¹¹ Therefore, the ability of a small refinery to pass through its RIN costs will depend on the unique facts of the small refinery, its cost level and its market power. These factors are properly assessed through the small refinery hardship petition process.

margin independent of the standard, thus causing compliance costs to be minimal.” Regulatory Impact Analysis: Renewable Fuel Standard Program, page 336-337, April 2007.

⁸ Letter from David Masuret, Senior Vice President of Petroleum Supply and Operations, and Matthew Durand, Manager of Government Affairs and Public Policy, Office of the General Counsel, Cumberland Farms, to Gina McCarthy, Administrator, U.S. Environmental Protection Agency 9 (Nov. 2, 2016) (available at EPA-HQ-OAR-2016-0544-0055).

⁹ Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017, 80 Fed. Reg. 77420, 77482-83 (Dec. 14, 2015).

¹⁰ “A Preliminary Assessment of RIN Market Dynamics, RIN Prices, and Their Effect,” Dallas Burkholder, Office of Transportation and Air Quality, US EPA. May 14, 2015.

¹¹ DOE Study at 22-23.

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But EPA's study on RIN cost pass-through suffers from other infirmities. The study failed to explain how a merchant refiner can recover its RIN cost when competing at the rack with "a blender that does not have an RVO, i.e., a gasoline marketer, or . . . a refiner who blends in excess of its RVO."¹² In contrast to EPA's conclusion, DOE concluded that, after consideration of the ethanol margin and tax credits, the refiner that blends in excess of its RVO and the gasoline marketer would have a significant cost advantage over the merchant refiner at the rack.¹³ Unlike DOE's study, EPA's study failed to explain how, in the intensely competitive transportation fuel market, a merchant refiner could pass through its higher RIN cost when its rack competition has little or no RIN cost to pass through, any more than a refiner would have the ability to pass through higher labor or utility costs. Either the merchant refiner does not recover all of its RIN costs or the gasoline marketer and RIN-long refiner are recovering a cost they did not incur, either of which hurts the competitive position of the merchant refinery.

RFA and API express concerns that increasing the number and magnitude of small refinery hardship exemptions could destabilize the program or cause RIN market disruptions, but their worries are misplaced. First, as API acknowledges, its members have, through capital investments, taken steps to reduce their RFS burden. Therefore, small refineries owned by large integrated refiners are unlikely to apply for relief or receive it based on the findings in the DOE study. Small refineries not owned by large integrated companies produce less than 7.4% of the national transportation fuel volume and, to address RFA's particular concern, small refineries disproportionately produce diesel fuel, not gasoline. In fairness, EPA could address RFA's and API's concern, in part, by timely deciding hardship petitions. If hardship petitions were decided 90 days after submission, the exemptions would occur throughout the year and not all at once on the eve of the compliance deadline.

RFA also expresses concerns about a lack of transparency in the hardship petition process. However, the standard applied to small refinery hardship petitioners is already public. It is described in detail in the DOE study. The 10th Circuit Court of Appeals reminded EPA that hardship relief does not require a demonstration that compliance with the RFS will cause an existential threat to the small refinery, and that the hardship standard is intended to measure the disproportionate regulatory burden and not whether the refinery can absorb the disproportionate regulatory burden and remain profitable.¹⁴ The Coalition does not oppose EPA releasing the aggregated volume of exempted fuel, but does not support releasing the identity of refineries applying for or receiving hardship relief.

¹² DOE Study at B-5.

¹³ *Id.*

¹⁴ *Sinclair Refining Co. v. U.S. Environmental Protection Agency*, No. 16-9532 (10th Cir. Aug. 15, 2017) (available at <https://www.ca10.uscourts.gov/opinions/16/16-9532.pdf>).

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RFA is an aggressive advocate for the ethanol industry. It opposes lowering the nationwide volume mandates, opposes state waiver petitions, opposes granting relief to Philadelphia Energy Solutions in the pending bankruptcy proceeding, opposes moving the point of obligation downstream to those that control the blending, and now opposes small refinery hardship relief. EPA should be circumspect when weighing RFA's interests against the interests of all other stakeholders. The program is not working as Congress or EPA intended, and causing additional harm to small refineries in an effort to force more ethanol into the market is not the solution.

The Coalition supports RFS reform that would put small refineries back on a level playing field with the API members. EPA, RFA, API, the small refineries, and other interested parties should be working together to reform the RFS to achieve the goals of the program without causing harm to critical energy infrastructure and important American jobs. Until then, EPA should grant hardship relief to small refineries as Congress intended for all of the reasons described in the DOE Study.

Very truly yours,



LeAnn Johnson Koch

cc (via electronic mail only): Mandy Gunasekara, EPA
Members of the Coalition¹⁵

¹⁵ Alon Refining Krotz Springs, Inc.; American Refining Group, Inc.; Calumet Specialty Products Partners, L.P.; Lion Oil Company; Ergon Refining, Inc.; Ergon-West Virginia, Inc.; Hunt Refining Company; Placid Refining Company LLC; U.S. Oil & Refining Co.; Par Hawaii Refining, LLC and Wyoming Refining Company.

Message

From: Nelson, Karen [nelson.karen@epa.gov]
Sent: 10/1/2019 8:38:12 PM
To: Cohen, Janet [cohen.janet@epa.gov]
Subject: RE: DPP & CBI: No new vintage RINs letter

Got it. Making that change, and I'll send it on to Sue and CC you on that transmission.

Thanks Janet!
-Karen

From: Cohen, Janet <cohen.janet@epa.gov>
Sent: Tuesday, October 1, 2019 4:35 PM
To: Nelson, Karen <nelson.karen@epa.gov>
Subject: RE: DPP & CBI: No new vintage RINs letter

Yes, Appendix A and Attachment A are too much the same to distinguish and that did create confusion. Let's just call ours an attachment. Since there's only one we don't need to add the "A"

Another try:

Ex. 5 Deliberative Process (DP)

From: Nelson, Karen <nelson.karen@epa.gov>
Sent: Tuesday, October 01, 2019 4:29 PM
To: Cohen, Janet <cohen.janet@epa.gov>
Subject: RE: DPP & CBI: No new vintage RINs letter

Ex. 5 Deliberative Process (DP)

From: Cohen, Janet <cohen.janet@epa.gov>
Sent: Tuesday, October 1, 2019 4:22 PM
To: Nelson, Karen <nelson.karen@epa.gov>
Subject: RE: DPP & CBI: No new vintage RINs letter

I looked for that before deleting. It's in the first paragraph! On reread, I guess you were referring to her Appendix A, not ours. So how about this?

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

From: Nelson, Karen <nelson.karen@epa.gov>
Sent: Tuesday, October 01, 2019 4:05 PM
To: Cohen, Janet <cohen.janet@epa.gov>
Subject: RE: DPP & CBI: No new vintage RINs letter

Actually, I noticed the deletion of the introduction to the attached list of refineries in the body of the letter without introducing it in the body somewhere else, would you have a moment to discuss this edit? I think it may be important to mention the attachment in the body, as opposed to only mentioning it in the footnote. But I'm interested in your thoughts.

Are you still in the office right now? Or should I call you (and at which number?)

Thanks!
-karen

From: Cohen, Janet <cohen.janet@epa.gov>
Sent: Tuesday, October 1, 2019 3:56 PM
To: Nelson, Karen <nelson.karen@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>
Subject: RE: DPP & CBI: No new vintage RINs letter

A couple of more little editorial edits from me. – j. -

From: Nelson, Karen <nelson.karen@epa.gov>
Sent: Tuesday, October 01, 2019 10:11 AM
To: Stahle, Susan <Stahle.Susan@epa.gov>
Cc: Cohen, Janet <cohen.janet@epa.gov>
Subject: DPP & CBI: No new vintage RINs letter

Hi Sue!

Here's the newest draft of that letter.

Thank you for your time.

Sincerely,
Karen Nelson
Compliance Division
(734) 214-4657

Ex. 5 Deliberative Process (DP)

Do not release without review. This email and any attached documents may contain information claimed as CBI, confidential attorney-client communications, privileged attorney work product, and/or privileged and confidential deliberative process material.

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Message

From: Bunker, Byron [bunker.byron@epa.gov]
Sent: 6/18/2019 5:01:04 PM
To: Stahle, Susan [Stahle.Susan@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]
CC: Dubey, Susmita [dubey.susmita@epa.gov]; Hengst, Benjamin [Hengst.Benjamin@epa.gov]
Subject: RE: Ex. 4 CBI litigation - response to mediator regarding potential for settling this case

Here is a suggested note for Bill on the Ex. 4 CBI settlement question. If the team is OK with this (please mark it up if you have edits), we will get it to Chris to send to Bill.

Thanks,

Byron

**** Draft Note ****

Bill,

Ex. 5 Deliberative Process (DP)

Thanks,

Byron

Byron Bunker
Director Compliance Division
Office of Transportation and Air Quality

Environmental Protection Agency
2000 Traverwood Drive
Ann Arbor, MI 48105
Bunker.Byron@epa.gov
Phone: (734) 214-4155

Ex. 6 Personal Privacy (PP)

From: Stahle, Susan
Sent: Monday, June 17, 2019 5:33 PM
To: Bunker, Byron <bunker.byron@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>
Cc: Dubey, Susmita <dubey.susmita@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Subject: RE: Ex. 4 CBI litigation - response to mediator regarding potential for settling this case

Thanks Byron. Why don't we talk tomorrow either during our small refinery call or the weekly fuels meeting about what to include in the note.

Susan Stahle
Air and Radiation Law Office
Office of General Counsel
U.S. Environmental Protection Agency
WJCN-7502B
202-564-1272

From: Bunker, Byron
Sent: Monday, June 17, 2019 5:26 PM
To: Cohen, Janet <cohen.janet@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>
Cc: Dubey, Susmita <dubey.susmita@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Subject: RE: Ex. 4 CBI litigation - response to mediator regarding potential for settling this case

Thanks Sue.

I think we will need to get Chris's and Bill's concurrence, but my view is the same as Janet's.

I would suggest that we draft a note that summarizes the situation and our position. We can then send that to Chris and subsequently Bill for their concurrence.

Here is the summary as I see it.

Ex. 5 Deliberative Process (DP)

Thanks,

Byron

Byron Bunker

Director Compliance Division
Office of Transportation and Air Quality
Environmental Protection Agency
2000 Traverwood Drive
Ann Arbor, MI 48105
Bunker.Byron@epa.gov
Phone: (734) 214-4155

Ex. 6 Personal Privacy (PP)

From: Cohen, Janet
Sent: Monday, June 17, 2019 3:53 PM
To: Stahle, Susan <Stahle.Susan@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>
Cc: Dubey, Susmita <dubey.susmita@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Subject: RE: Ex. 4 CBI litigation - response to mediator regarding potential for settling this case

Ex. 5 Deliberative Process (DP)

- J. -

From: Stahle, Susan
Sent: Monday, June 17, 2019 3:46 PM
To: Bunker, Byron <bunker.byron@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>
Cc: Dubey, Susmita <dubey.susmita@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Subject: Ex. 4 CBI litigation - response to mediator regarding potential for settling this case

Hi –

Ex. 5 Deliberative Process (DP) / Attorney-Client Privilege / Attorney Work Product

Ex. 5 Deliberative Process (DP) / Attorney-Client Privilege / Attorney Work Product

Please let me know if you have any questions.

Thanks,

Susan Stahle
Air and Radiation Law Office
Office of General Counsel
U.S. Environmental Protection Agency
WJCN-7502B
202-564-1272

Message

From: Stahle, Susan [Stahle.Susan@epa.gov]
Sent: 6/6/2019 8:56:54 PM
To: Parsons, Nick [Parsons.Nick@epa.gov]
CC: Nelson, Karen [nelson.karen@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]
Subject: Ex. 4 CBI litigation - question on what RINs we gave back to them
Attachments: Ex. 4 CBI Petition for Review - 5.23.19 [UNDER SEAL] (2).PDF

Hi –

Hopefully a quick question – could you tell me exactly what RINs we gave back to Ex. 4 CBI after we granted its 2017 petition (attached to the petition for review attached above)?

Ex. 5 Deliberative Process (DP) / Attorney Work Product

Thanks,

Susan Stahle
Air and Radiation Law Office
Office of General Counsel
U.S. Environmental Protection Agency
WJCN-7502B
202-564-1272

Message

From: Pugliese, Holly [pugliese.holly@epa.gov]
Sent: 4/1/2019 3:11:40 PM
To: Cohen, Janet [cohen.janet@epa.gov]
Subject: RE: Loeb sack response letter re: small refinery exemption
Attachments: 18-000-8567 small refinery exemptions process.pdf

Ok thanks. And here is the incoming. The list is getting shorter if that makes you feel any better ;0

Holly Pugliese
 Office of Transportation and Air Quality
 US EPA
 pugliese.holly@epa.gov

From: Cohen, Janet
Sent: Monday, April 01, 2019 11:09 AM
To: Pugliese, Holly <pugliese.holly@epa.gov>
Subject: RE: Loeb sack response letter re: small refinery exemption

Thanks Holly. I told Ben I'd work on this today.

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

- J. -

From: Pugliese, Holly
Sent: Monday, April 01, 2019 11:07 AM
To: Cohen, Janet <cohen.janet@epa.gov>
Subject: FW: Loeb sack response letter re: small refinery exemption

Hi Janet. This is the last I saw on the this. It's not clear to me who should make the call on the change that Ryland wanted and if then it's ready to move forward. Let me know what you think please.

Holly Pugliese
 Office of Transportation and Air Quality
 US EPA
 pugliese.holly@epa.gov

From: Li, Ryland (Shengzhi)
Sent: Tuesday, March 05, 2019 12:45 PM
To: Stahle, Susan <Stahle.Susan@epa.gov>; Meekins, Tanya <Meekins.Tanya@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Machiele, Paul <machiele.paul@epa.gov>; Pugliese, Holly <pugliese.holly@epa.gov>
Cc: Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Subject: RE: Loeb sack response letter re: small refinery exemption

Thanks Sue

Ex. 5 Deliberative Process (DP) / Attorney-Client Privilege / Attorney Work Product

Ex. 5 Deliberative Process (DP) / Attorney-Client Privilege / Attorney Work Product

Ex. 5 Deliberative Process (DP) / Attorney-Client Privilege / Attorney Work Product

Regards,

Ryland

Ryland (Shengzhi) Li
 Attorney-Adviser
 U.S. Environmental Protection Agency
 Office of General Counsel, Air and Radiation Law Office
 tel: (202) 564-6787 | em: li.ryland@epa.gov | desk: WJC-N 7409G
 mail: USEPA (2344A), 1200 Pennsylvania Ave. NW, Washington, DC 20460

From: Stahle, Susan
Sent: Tuesday, March 5, 2019 9:51 AM
To: Meekins, Tanya <Meekins.Tanya@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Machiele, Paul <machiele.paul@epa.gov>; Pugliese, Holly <pugliese.holly@epa.gov>
Cc: Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Li, Ryland (Shengzhi) <Li.Ryland@epa.gov>
Subject: RE: Loeb sack response letter re: small refinery exemption

Here are my edits/comments. **Ex. 5 Deliberative Process (DP)**
Ex. 5 Deliberative Process (DP)

I think this letter could use another good once-over by someone before sending out.

Susan Stahle
 Air and Radiation Law Office
 Office of General Counsel
 U.S. Environmental Protection Agency
 WJCN-7502B
 202-564-1272

From: Meekins, Tanya
Sent: Tuesday, March 5, 2019 8:41 AM
To: Cohen, Janet <cohen.janet@epa.gov>; Machiele, Paul <machiele.paul@epa.gov>; Pugliese, Holly <pugliese.holly@epa.gov>
Cc: Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>
Subject: RE: Loeb sack response letter re: small refinery exemption

Hi Janet,

I thought we had already gotten BW ok on this, but I'll chat with Ben this morning.

From: Cohen, Janet
Sent: Tuesday, March 5, 2019 7:00 AM
To: Machiele, Paul <machiele.paul@epa.gov>; Meekins, Tanya <Meekins.Tanya@epa.gov>; Pugliese, Holly <pugliese.holly@epa.gov>
Cc: Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>
Subject: RE: Loeb sack response letter re: small refinery exemption

Thanks Paul. I like that. Will remove for final version but I still think we need ok from BW before we can send these out. –j. -

From: Machiele, Paul
Sent: Monday, March 04, 2019 11:01 PM
To: Cohen, Janet <cohen.janet@epa.gov>; Meekins, Tanya <Meekins.Tanya@epa.gov>; Pugliese, Holly <pugliese.holly@epa.gov>
Cc: Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>
Subject: RE: Loeb sack response letter re: small refinery exemption

Ex. 5 Deliberative Process (DP)

Paul

From: Cohen, Janet
Sent: Monday, March 04, 2019 5:40 PM
To: Meekins, Tanya <Meekins.Tanya@epa.gov>; Pugliese, Holly <pugliese.holly@epa.gov>
Cc: Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Machiele, Paul <machiele.paul@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>
Subject: RE: Loeb sack response letter re: small refinery exemption

Tanya,

Not quite yet.

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

From: Meekins, Tanya
Sent: Monday, March 04, 2019 3:47 PM
To: Cohen, Janet <cohen.janet@epa.gov>; Pugliese, Holly <pugliese.holly@epa.gov>
Cc: Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Subject: Loeb sack response letter re: small refinery exemption

Hi Holly/Janet

Can we get Byron's approval on this response?

From: Stahle, Susan
Sent: Thursday, February 28, 2019 11:25 AM
To: Pugliese, Holly <pugliese.holly@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Cc: Meekins, Tanya <Meekins.Tanya@epa.gov>; Graham, Cheryl <Graham.Cheryl@epa.gov>
Subject: RE: FYI - letter re: small refinery exemption

I agree that the incoming letter – a notice of intent to sue (NOI) – does not match the draft response. These are two separate matters. Seems we need to match the draft response with the correct incoming letter before proceeding.

Ex. 5 Deliberative Process (DP)

Susan Stahle
Air and Radiation Law Office
Office of General Counsel
U.S. Environmental Protection Agency
WJCN-7502B
202-564-1272

From: Pugliese, Holly
Sent: Thursday, February 28, 2019 11:12 AM
To: Cohen, Janet <cohen.janet@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Cc: Meekins, Tanya <Meekins.Tanya@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>
Subject: RE: FYI - letter re: small refinery exemption

Thanks Janet. I've added the incoming and draft response for Sue's FYI.

Holly Pugliese
Office of Transportation and Air Quality
US EPA
pugliese.holly@epa.gov

From: Cohen, Janet
Sent: Thursday, February 28, 2019 11:10 AM
To: Pugliese, Holly <pugliese.holly@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Cc: Meekins, Tanya <Meekins.Tanya@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>
Subject: RE: FYI - letter re: small refinery exemption

Thanks Holly. I commented previously that I believe this one should be de-controlled. The incoming is a notice of intent to sue. It is thus a legal/procedural notification directed to the Agency rather than an inquiry or comment on Agency policy. I do not know whether OGC responds in any way to such notices of intent but certainly any follow would not come from OAR. The response you attached to the note was intended to go with a different incoming letter. Adding Sue to distribution. –j. -

From: Pugliese, Holly
Sent: Thursday, February 28, 2019 9:35 AM
To: Cohen, Janet <cohen.janet@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Cc: Meekins, Tanya <Meekins.Tanya@epa.gov>
Subject: FW: FYI - letter re: small refinery exemption

Hi Ben and Janet. Tanya is asking for an update on this particular hardship control. Attached is the response that Janet drafted that she sent around on 2/8/2019 with the note below. Please let us know what you think.

18-000-8567 is a Congressional for BW signature that needs to be reviewed by Ben at minimum. Attached version has updated numbers and a couple of flags to check.

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Holly Pugliese
Office of Transportation and Air Quality
US EPA
pugliese.holly@epa.gov

From: Meekins, Tanya
Sent: Thursday, February 14, 2019 8:15 AM
To: Cohen, Janet <cohen.janet@epa.gov>
Cc: Pugliese, Holly <pugliese.holly@epa.gov>
Subject: FYI - letter re: small refinery exemption

Hi Janet

Attached is a letter that came into the Agency from **Ex. 4 CBI**

Thanks

Congress of the United States
Washington, DC 20515

June 20, 2018

The Honorable Scott Pruitt
 Administrator
 U.S. Environmental Protection Agency
 Washington, DC

Dear Administrator Pruitt:

We write to convey our grave concerns and request additional information regarding your failed implementation of the Renewable Fuel Standard (RFS) program. We are deeply troubled by the lack of transparency and continued manipulation of the RFS program through your misuse of the small refinery exemption process authorized in section 211(o)(9) of the Clean Air Act (CAA).

The Environmental Protection Agency (EPA) continues to hurt farmers and undermine the biofuels market by extending waivers to an unusually large number of refineries. Agricultural communities, especially throughout the Midwest and Southern Plains, are experiencing financial hardship due to low commodity prices and reduced access to foreign markets resulting from uncertainties in our trade policies. Additionally, your implementation of the RFS program is undercutting the market for renewable fuels, and inflicting further economic pain in rural communities and throughout the agriculture sector.

Exceeding Clean Air Act Authority

EPA reportedly granted dozens of small refinery waivers¹ and awarded millions of dollars' worth of renewable fuel blending credits to refiners based upon the denial of an extension of a waiver in 2014.²

We believe EPA has exceeded its authority under the CAA through the retroactive award of Renewable Identification Numbers (RINs) and by attempting to compensate companies by providing them RINs. Additionally, EPA appears to have further exceeded its authority by issuing RINs that do not represent the production of any actual gallons of biofuels. For example, EPA recently issued RINs worth millions of dollars to two companies, Sinclair Oil and HollyFrontier, on the basis that they did not receive extensions of a waiver in 2014. However, it

¹ *U.S. ethanol groups bristle as EPA frees refiners from biofuels law*, Reuters (Apr. 4, 2018) (www.reuters.com/article/us-usa-biofuels-epa-refineries/u-s-ethanol-groups-bristle-as-epa-frees-refiners-from-biofuels-law-idUSKCN1HB2AH).

² *U.S. EPA grants refiners biofuel credits to remedy Obama-era waiver denials*, Reuters (May 31, 2018) (www.reuters.com/article/us-usa-biofuels-waivers-exclusive/exclusive-u-s-epa-grants-refiners-biofuel-credits-to-remedy-obama-era-waiver-denials-idUSKCN1IW1DW).

is unclear how, if at all, these RINs represent gallons of renewable fuel as required under the law. We are concerned EPA may be issuing RINs worth millions of dollars that represent phantom biofuels.³

Dramatic Rise in Hardship Among Refineries is Not Credible

Congress did not intend to permanently relieve small refineries of the obligation to comply with the RFS program. The Energy Policy Act of 2005 provided the original waivers for these facilities through 2011, with the potential for the Administrator to extend a waiver through 2013 if it were warranted based upon information provided in the required Department of Energy (DOE) analysis.

Although the original exemption was provided to 59 refineries, less than half of those responded to DOE's survey that initially would allow them to receive an extension of a waiver for an additional two years.⁴ DOE noted in the report summary that several large companies with small refining facilities that received exemptions previously notified DOE that "they were not going to respond to the survey because they did not believe they faced economic hardship."⁵

In 2014, DOE adjusted one of the metrics for scoring small refineries to reflect the improved economic conditions for the refining sector. The adjustment also recognized the fact that obligated parties had developed more physical and contractual compliance mechanisms over the nine years of the RFS program's existence.⁶ It is difficult to believe that 13 years into the RFS program, with an economy that is clearly benefiting the oil and refining sectors, that there could be such a dramatic increase in the number of small refineries suffering 'disproportionate economic hardship' — especially those that are part of large, integrated firms.

Lack of Transparency Undermines RFS Program Implementation

By authorizing these waivers in secret, EPA risks creating significant opportunities for market manipulation, uncertainty for regulated entities, and an opportunity to reduce annual renewable volume obligations (RVOs) in an opaque and arbitrary manner.

At a minimum, EPA should be identifying publicly any facility receiving an exemption of its obligation to comply with the RFS. EPA should also provide summary statistics revealing the total number of gallons of biofuels represented by the exemptions granted within a compliance

³ *Sinclair Wyo. Ref. Co. v. United States EPA*, 874 F.3d 1159 (10th Cir. 2017).

⁴ Department of Energy Office of Policy and International Affairs, *Small Refinery Exemption Study An Investigation into Disproportionate Economic Hardship* (Mar. 2011) (www.epa.gov/sites/production/files/2016-12/documents/small-refinery-exempt-study.pdf).

⁵ *Id.* at vii.

⁶ U.S. Department of Energy; Office of Energy Policy and Systems Analysis, *Addendum to the Small Refinery Exemption Study An Investigation into Disproportionate Economic Hardship* (May 2014) (www.epa.gov/sites/production/files/2016-12/documents/rfs2-small-refiner-study-addendum-05-2014.pdf).

year. Withholding this information ensures that only a select few participants have information material to the market for renewable fuels and RINs.

Markets cannot function properly without transparency. Company names and awards of exemptions by a federal agency are not confidential business information. In fact, publicly traded firms are required to report the value of these exemptions to the Securities and Exchange Commission, and much of the reporting on these exemptions has been due to examination of these public documents. Withholding this information makes EPA complicit in any unfair manipulation of the renewable fuels and RINs markets.

We request that you provide us with information regarding this recent phenomenon, so that we can evaluate the need for this expansion of the exemption process. Please provide responses to the following specific requests:

1. What is the total number of small refinery exemption petitions that EPA received in each year from 2013 through 2017?
2. For each year from 2013 through 2017, how many exemptions did the EPA grant?
3. What is the total volume of renewable fuels represented by the exemptions granted for each year 2013 through 2017?
4. What is the process for confirming that each refinery submitting a petition falls beneath the 75,000 barrel-per-day throughput capacity? Please provide written documentation of the EPA review process, including all compliance, and verification conducted by EPA staff.
5. What threshold number of gallons exempted under the small refinery exemption does EPA believe represents a significant enough proportion to require an adjustment either to the current compliance year's RVO or to the next compliance year's RVO to assure compliance with the annual volume requirements set by section 211(o)(2)(B)(i) of the Clean Air Act?
6. Are any exempted gallons reassigned to remaining obligated parties for blending? If so, are they reassigned within the same compliance year? If they are not reassigned to the remaining obligated parties, what is the disposition of those gallons relative to the overall RVO set by the annual rules?
7. Did you inform President Trump or White House staff of the potential effects on the renewable fuel market of exempting a significant proportion of the annual renewable fuel blending requirement and the effects of such demand erosion on agricultural commodity prices and the economy in rural communities?
8. Did you consult with Secretary Perdue and USDA officials regarding the effects on agricultural commodity prices and the economy in rural communities?
9. DOE's publicly available 2011 study and addendum to the study clearly explain the metrics DOE uses to evaluate a small refinery's petition for an exemption under the

program. Please provide EPA's established metrics for evaluating small refinery petitions.

10. Did EPA consult with DOE on each of the petitions for a small refinery exemption for 2016 and 2017? How many of the applications reviewed by DOE did the Department recommend receive an extension of an exemption? For how many of the applications reviewed by DOE for these two compliance years did EPA disagree with DOE's recommendation to grant or deny the exemption?
11. Companies with multiple refining facilities can select to comply with the RFS program either on a company-wide basis or on a facility-by-facility basis. How many obligated parties with multiple facilities selected to comply on a facility-by-facility basis in 2016, 2017, and 2018?
12. It is our understanding that EPA has never awarded RIN's to a facility for past compliance years. Provide the citation to the law or the regulation that you relied upon in issuing new RINs to Sinclair Refining Company and HollyFrontier Refining Company.
13. As we are now well-past the time of the initial issuance of exemptions, please provide the list of 59 small refineries that EPA initially exempted from compliance with the RFS from 2011 to 2013, and the list of the 13 small refineries that DOE recommended receive an extension of their exemption through 2013.

We remain extremely concerned about your implementation of the RFS program and its effects on rural communities. Your actions are clearly designed to enrich the oil industry at the expense of farmers and the renewable fuels industry by undermining the RFS program. We request that you suspend the small refinery exemption process until you provide Congress with information to evaluate this program. We anticipate receiving your responses to our request by Friday, July 6, 2018.

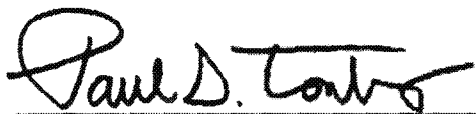
Sincerely,



Dave Loebsack
Member of Congress



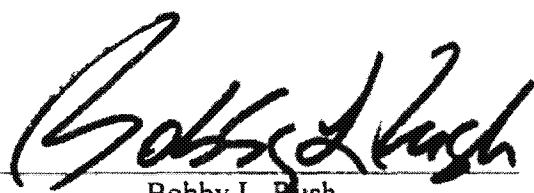
Cheri Bustos
Member of Congress



Paul Tonko
Member of Congress



Collin Peterson
Member of Congress



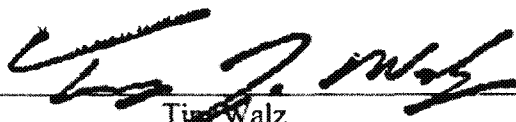
Bobby L. Rush
Member of Congress



Ann McLane Kuster
Member of Congress



Diana DeGette
Member of Congress



Tim Walz
Member of Congress



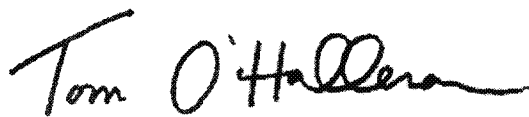
Scott Peters
Member of Congress



Richard M. Nolan
Member of Congress



John Sarbanes
Member of Congress



Tom O'Halleran
Member of Congress

Message

From: Nelson, Karen [nelson.karen@epa.gov]
Sent: 12/10/2019 3:49:27 PM
To: Bunker, Byron [bunker.byron@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]; Caballero, Kathryn [Caballero.Kathryn@epa.gov]; Michaels, Lauren [Michaels.Lauren@epa.gov]; Parsons, Nick [Parsons.Nick@epa.gov]
Subject: FW: RFS small refinery matter - RIN replacement response letter - for OAR review
Attachments: dshRLSO 2019.12.04 Vintage RIN v2+do.docx

Here is the David Orlin/David Harlow version Sue was discussing at today's meeting.

From: Orlin, David <Orlin.David@epa.gov>
Sent: Thursday, December 5, 2019 5:20 PM
To: Cohen, Janet <cohen.janet@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Caballero, Kathryn <Caballero.Kathryn@epa.gov>
Cc: Mroz, Jessica <mroz.jessica@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>
Subject: RE: RFS small refinery matter - RIN replacement response letter - for OAR review

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David Orlin
 U.S. EPA, Office of General Counsel
 (202) 564-1222

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Sent: Thursday, December 05, 2019 3:47 PM
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Ex. 5 Deliberative Process (DP)

- J. -

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Ex. 5 Deliberative Process (DP) / Attorney-Client Privilege / Attorney Work Product

Susan Stahle
Air and Radiation Law Office
Office of General Counsel
U.S. Environmental Protection Agency
WJCN-7502B
202-564-1272

From: Bunker, Byron <bunker.byron@epa.gov>
Sent: Thursday, December 5, 2019 3:04 PM
To: Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Caballero, Kathryn <Caballero.Kathryn@epa.gov>
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I dropped David and Alex from the e-mail chain and added Janet, Karen and Kathryn.

Ex. 5 Deliberative Process (DP)

Janet – can you please make sure that you are OK with David’s edits? I don’t want mine to be the only OTAQ/SRE eyes on the suggested changes.

Thanks,

Byron

Byron Bunker
Director Compliance Division
Office of Transportation and Air Quality
Environmental Protection Agency
2000 Traverwood Drive
Ann Arbor, MI 48105
Bunker.Byron@epa.gov
Phone: (734) 214-4155

Ex. 6 Personal Privacy (PP)

From: Harlow, David <harlow.david@epa.gov>
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David S. Harlow
Senior Counsel
Immediate Office of the Acting Assistant Administrator
Office of Air and Radiation, USEPA
WJC-N Room 5409K
1200 Pennsylvania Avenue NW
Washington, DC 20460
202-564-1233
Harlow.David@epa.gov

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Please review this and, if appropriate, share with Anne. When you are done with your review, please let me know and we will send it down formally for signature.

Ex. 5 Deliberative Process (DP)

<2019.12.04 Vintage RIN v2.docx>

Message

From: Hengst, Benjamin [Hengst.Benjamin@epa.gov]
Sent: 12/6/2019 2:03:59 PM
To: Bunker, Byron [bunker.byron@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]
Subject: Re: RFS small refinery matter - RIN replacement response letter - for OAR review

Byron — I will call you today to discuss next steps on this (and Ex. 4 CBI) Thanks. Ben

On Dec 5, 2019, at 5:20 PM, Orlin, David <Orlin.David@epa.gov> wrote:

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Ex. 5 Deliberative Process (DP)

<2019.12.04 Vintage RIN v2.docx>

<dshRLSO 2019.12.04 Vintage RIN v2+do.docx>

Mon Mar 25 16:37:09 EDT 2019
"Wheeler, Andrew" <wheeler.andrew@epa.gov>
Fw: Supplemental Petition for Reconsideration -- Producers United
To: "CMS.OEX" <cms.oex@epa.gov>

From: Jerome Muys <jmuys@muyslaw.com>
Sent: Monday, March 25, 2019 4:35 PM
To: Wheeler, Andrew
Cc: Dertke, Daniel (ENRD); Spence, Samara (ENRD); sandra@francoenvironmentallaw.com
Subject: Supplemental Petition for Reconsideration -- Producers United

Administrator Wheeler –

Attached please find the Supplemental Petition we are submitting on behalf of Producers United with respect to EPA’s consideration of the Small Refinery Exemption under the Clean Air Act. Thank you for your consideration of this submission.

With best regards,

Jerome C. Muys, Jr.

Muys & Associates LLC

910 17th Street, Suite 800
Washington, D.C. 20006
(202)-559-2054

March 25, 2019

Via Electronic Mail

The Honorable Andrew Wheeler, Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Mail Code: 1101A
Washington, DC 20460
Wheeler.andrew@Epa.gov

RE: Supplement to Petition for Reconsideration and Rulemaking and Request for
Administrative Stay regarding Small Refinery Exemptions

Dear Administrator Wheeler:

On July 31, 2018, Producers of Renewables United for Integrity Truth and Transparency (Petitioner)¹ submitted a Petition for Reconsideration and Rulemaking and Request for Administrative Stay. The petition related to EPA's handling of small refinery exemptions under the Renewable Fuel Standard (RFS) program. Although we believe that by re-asserting that it has authority to grant retroactive exemptions in the final 2019 Renewable Fuel Standard EPA has effectively denied aspects of the July 31, 2018 petition for reconsideration,² Petitioner also raised concerns with EPA's lack of transparency and refusal to provide information regarding its implementation of the statute's small refinery exemption provisions and 40 C.F.R. §80.1441. As such, the petition included a request for rulemaking to improve the transparency of EPA's small refinery exemption program. Information that has recently come to light provides further support for the request for greater transparency with respect to EPA's handling of small refinery exemptions. Thus, Petitioner submits this supplemental petition to request that EPA promptly disclose basic information regarding extensions of small refinery exemptions, including the information outlined in its proposed Renewable Enhancement and Growth Support ("REGS") Rule, 81 Fed. Reg. 80,828, 80,934 (Nov. 16, 2016).

¹ Petitioner includes biomass-based diesel and ethanol producers that participate in the RFS program.

² Petitioner submitted a Petition for Review on the 2019 final RFS on February 9, 2019 (Case No. 19-1036).

Petitioner also reasserts its request for an administrative stay on taking any further action with respect to small refinery exemptions until EPA provides the public with transparency on EPA's handling of the small refinery exemptions, including an explanation of its claimed authority in granting such exemptions, its criteria for considering and granting such exemptions, and other information needed for the market to understand how EPA is complying with its regulations and the statute in granting "extensions" well after small refineries have lost their exemption or have shown that they can comply with the volume requirements. Petitioner believes that EPA is required to provide notice and comment on structural and process changes made to its handling of small refinery exemptions, rather than amend its regulations through closed-door informal adjudications as EPA has been doing. Moreover, it is an abuse of discretion not to provide the public with notice and opportunity to comment on EPA's handling of these exemptions, given the significant impacts EPA's expansion of these exemptions has had on the program and the biofuels industry.

Since the petition for reconsideration/rulemaking was submitted, EPA has provided data showing a substantial increase in requests for "extensions" of the small refinery exemption. EPA now shows 39 pending requests for small refinery exemptions for compliance year 2018, which is the largest number of requests submitted to EPA, according to the data provided so far. On March 20, 2019, it was reported that EPA is likely to grant "partial" exemptions to some of these refineries.³ Use of partial exemptions is yet another change in EPA's handling of small refinery exemptions from what is in its regulations and does not appear grounded in the statute.⁴ *See also* Br. for the Pet'r at 35-38, 47-54, *Advanced Biofuels Ass'n v. EPA*, No. 18-1115 (D.C. Cir. filed Mar. 6, 2019). Even if EPA granted one partial exemption previously,⁵ EPA has basically been granting each and every request in recent years.⁶ EPA continues to take these actions behind closed doors, while at the same time acknowledging that the RIN-market and RFS participants need greater transparency. *See* 84 Fed. Reg. 10,584 (Mar. 21, 2019). EPA recognizes improved market transparency "helps obligated parties and other market participants make informed decisions" and "can reduce information asymmetry among market participants increasing confidence in the market." *Id.* at 10,608.

EPA's lack of transparency is purportedly based on claims of confidential business information (CBI) by small refineries. In its proposed REGS Rule, however, EPA proposed to codify a determination that basic information regarding the exemptions is not considered CBI and that such information should be provided to the public on regular basis. 81 Fed. Reg. at 80,934.⁷

³ *See* Jarrett Renshaw, *EPA likely to grant partial waivers from U.S. biofuel laws for 2018: sources*, Reuters, Mar. 20, 2019, <https://www.reuters.com/article/us-usa-epa-biofuel/epa-likely-to-grant-partial-waivers-from-u-s-biofuel-laws-for-2018-sources-idUSKCN1R12LN>.

⁴ Even though there is some report language for appropriations that may touch on small refinery exemptions, Congress has not amended the statute, and the public has had to file litigation to get a glimpse into how EPA handles these requests in response.

⁵ *See, supra* n.3.

⁶ EPA has denied zero requests for compliance years 2016 and 2017.

⁷ The proposed regulation would provide: "The following information related to petitions submitted under this section that have been accepted by EPA for evaluation is not entitled to confidential treatment under 40 CFR part 2, subpart B: (1) Petitioner's name. (2)

There, EPA determined correctly “that basic information related to EPA actions on petitions for RFS small refinery and small refiner exemptions may not be claimed as confidential business information.” *Id.* at 80,909. To date, EPA has declined to finalize its 2016 proposal, leaving interested parties to glean from congressional testimony and leaked reports to the press bits and pieces of information as to how it interprets its authority and regulations. Indeed, because EPA is acting outside its regulations, the public has been forced to initiate litigation to try to identify EPA’s claimed authority in its expansion of the small refinery exemptions and credits under the RFS (42 U.S.C. §7545(o)) and its rationale for taking such impermissible actions. This is directly contrary to EPA’s statutory obligations to ensure the RFS volumes are being met (and to do so through regulations), to the promises EPA made to Congress, and to good governance.

The requested information regarding exemption extensions is critical to assessing EPA’s implementation of the small refinery exemptions and the proper functioning of the RIN market. The aggregated data that EPA currently discloses on the number of requests submitted and granted provides the public with little information on how EPA actually interprets its authority and evaluates extension requests. In particular, this aggregated information provides no information on the impact of any individual exemption since it does not provide any information about the specific volumes being exempted and when, and whether the refinery retired RINs and is seeking “unretired” or “new” RINs to replace those RINs, which would indicate whether, when and how many RINs may be (illegally) re-entering the market. This allows small refineries to gain a competitive advantage over the rest of the market, by having access to information no one else can obtain, and to manipulate the RFS regulations and market, by picking and choosing what regulations it must follow as an obligated party or when it can dump RINs into the market as an exempt refinery.⁸ Apparently recognizing the inconsistencies between its current regulations and EPA’s “practice” in allowing retroactive exemptions, EPA’s recent proposal on RIN reforms proposes different treatment for small refineries. *See, e.g.*, 84 Fed. Reg. at 10,618. This proposal does not address the concerns raised regarding potential impacts to the market or EPA’s failure to ensure the required volumes (or EPA’s failure to provide notice and comment on EPA’s interpretation of the small refinery exemption provisions).

EPA has, in fact, provided no basis for withholding as CBI such basic information as a small refinery’s request for an extension of the small refinery exemption under the RFS program, EPA’s determination as to that request (and the rationale in support), and the impact of those

The name and location of the facility for which relief is requested. (3) The general nature of the relief requested. (4) The time period for which relief is requested. (B) The following information related to EPA determinations on petitions submitted under this section is not entitled to confidential treatment under 40 CFR part 2, subpart B: (1) Petitioner’s name. (2) The name and location of the facility for which relief was requested. (3) The general nature of the relief requested. (4) The time period for which relief was requested. (5) The extent to which EPA either granted or denied the requested relief. (C) The EPA will disclose the information specified in paragraphs (e)(2)(iv)(A) and (B) of this section on its Web site, or will otherwise make it available to interested parties, notwithstanding any claims that the information is entitled to confidential treatment under 40 CFR part 2, subpart B.”

⁸ EPA imposes limitations on a small refinery’s ability to separate RINs, which are not applicable to refiners that are obligated parties. 40 C.F.R. §80.1429(b).

exemptions on the program.⁹ As EPA explained in the REGS proposal, the fact of seeking an extension and EPA's decision on that exemption is not CBI. In fact, some companies have publicly disclosed that they have received exemptions under the RFS program, even assigning a value to the RIN "savings" from those exemptions that can provide insight into the scope of the exempted volumes associated with their individual exemption (particularly where the U.S. Energy Information Administration provides information on refinery capacities).¹⁰ Other refineries have admitted they have received or sought exemptions in litigation. In other words, these businesses have not taken action to ensure against public disclosure, even disclosing the information themselves, and there is no risk that they will not continue to seek extensions (if eligible) were EPA to provide more specifics on who is requesting and receiving exemptions.

Recently, EPA posted a notice of intent to sue letter from Kern Oil & Refining Co., dated February 7, 2019,¹¹ which provides the same information that EPA had proposed to provide for all exemptions. That is, through this letter, EPA has posted information related to the name and location of the refinery seeking the exemption and the nature and extent of the relief requested (*e.g.*, relieving an obligation of 23 million RINs for compliance year 2017). This is further evidence that EPA does not believe that this type of information is CBI and, thus, it is unclear how EPA could continue to refuse to provide information regarding its decisions with respect to requests for extensions of the small refinery exemptions to the public. There are numerous Freedom of Information Act and Congressional requests to make this information publicly available. Given the strong, and widespread, interest in this information, EPA should make any

⁹ In testimony before the Senate Environment and Public Works Committee, you acknowledged that granting of small refinery exemptions "takes barrels away" from the RFS requirements. Hearing on the Nomination of Andrew Wheeler to be Administrator of the Environmental Protection Agency before the U.S. Senate Committee on Environment and Public Works, Jan. 16, 2019, Tr. at 54, *available at* https://www.epw.senate.gov/public/_cache/files/6/c/6ca552e9-7080-46b2-9aba-50f858dbfb31/EFD9580A8C9CFC98C19BFF1248249EC7.spw-011619.pdf.

¹⁰ The Small Refiners Coalition, which included ten companies, submitted comments opposing EPA's REGS Rule proposal, asserting that the proposal would "necessarily reveal information about the company's financial position." EPA-HQ-OAR-2016-0041-0317 (Feb. 16, 2017) at 1 n.1, 7. But the proposal would not release any financial information of the company, and, significantly, the Coalition revealed that its members have sought and received exemptions, showing that the fact that these companies have sought or received an exemption is not the type of information that the company normally treats as confidential. *See, e.g.*, EPA Letter to Perkins Coie, Sept. 7, 2016, at 2; *see also id.* at 1 (quoting Coalition's assertion that some of its members "are in very weak financial positions"); Delek US Holdings, Inc., Form 10-K for fiscal year ending Dec. 31, 2018, at 63, 82, F-49, *available at* <https://delekus.gcs-web.com/node/15566/html>. Moreover, there is no explanation provided as to how releasing general information as to the scope and reasons for EPA's decision would harm the small refinery, which is seeking relief from regulatory obligations.

¹¹ Available at https://www.epa.gov/sites/production/files/2019-02/documents/kor_noi_2_7_2019.pdf.

information it provides on small refinery exemptions to individual requestors available to the public as a whole.

Additionally, as EPA explained, basic information on who is requesting and receiving exemptions and the timing and extent of those exemptions is necessary to identify the “nature and scope of work that the EPA has decided to undertake.” 81 Fed. Reg. at 80,910. Of particular concern to Petitioner is that the Kern Oil letter requests the same treatment as HollyFrontier and Sinclair Oil to issue current-year RINs to account for RINs it already has retired. Although Petitioner believes EPA lacks such authority, this request further illustrates why EPA’s practice of taking these actions behind closed doors is against good governance. To the extent EPA believes it has authority to allow unretiring of RINs, including creation of new RINs, it was required to undergo notice-and-comment rulemaking. Part and parcel of this obligation is to provide the public with the information needed to understand the scope and potential impacts of EPA’s actions. In its recent proposal on RIN reforms, EPA noted some of its “practice” in how it handles small refinery exemption requests, which have not been subject to notice and comment. This is insufficient to meet EPA’s substantive and procedural obligations under administrative law and the RFS statute.

For the foregoing reasons and as outlined in its July 31, 2018 petition, Petitioner requests that EPA finalize its determination that basic information regarding small refinery exemptions be publicly disclosed. Several economists have tied volatility in RIN markets to the uncertainty created by EPA’s actions done behind closed doors.¹² EPA itself has acknowledged the need for greater transparency in the RIN market, and, significantly, EPA committed to “provide more transparency on how [EPA] make[s] these [small refinery exemption] decisions.”¹³ Indeed, this information can be provided without finalizing the regulation, in which EPA was simply codifying its determination to facilitate disclosure. This information could be provided on the same website EPA already initiated for small refinery exemptions. Thus, Petitioner urges EPA to begin providing the basic information on who is seeking and receiving exemptions and the timing and extent of those requests and exemptions, as soon as possible.¹⁴

In any event, given that EPA has already made Kern Oil’s letter public, there is no valid reason to keep secret any action done in response to that letter, including granting or denying the request for an exemption and request to allow generation of current-year RINs. At a minimum,

¹² Hearing before Subcommittee on Environment, U.S. House Committee on Energy and Commerce, July 25, 2018, Preliminary Tr. at 619-623, 649-650, 1120-1124, *available at* <https://docs.house.gov/meetings/IF/IF18/20180725/108610/HHRG-115-IF18-Transcript-20180725.pdf>.

¹³ Hearing Before U.S. Senate Committee on Environment and Public Works, Aug. 1, 2018, Tr. at 75, *available at* https://www.epw.senate.gov/public/_cache/files/a/f/afffe2f0-6008-4c2a-af13-87d1cb26d6be/7564C79E99E118F3853D747150119932.spw-080118.pdf; *see also id.* at 30, 47, 55-58, 84-85; 83 Fed. Reg. 63,704, 63,707 (Dec. 11, 2018).

¹⁴ On March 14, EPA indicated it had granted five more exemptions for compliance year 2017. As of March 23, 2019, EPA has indicated there are 42 requests for small refinery exemptions still pending (1 for compliance year 2016, 2 for compliance year 2017, and 39 for compliance year 2018).

Kern Oil has waived any rights to treat the decision as confidential and, therefore, EPA must provide its determination with respect to the Kern Oil letter to the public.

Request for Administrative Stay

EPA continues to make significant and drastic changes to its handling of small refinery exemptions without undertaking public notice and comment or even providing any guidance to the public to understand its actions and ensure EPA is complying with its statutory obligations under the RFS program. These changes exceed the statutory authority granted by Congress. Challenges to these violations of Congress's directives are likely to succeed on the merits of any litigation. In addition, this lack of transparency has continued to have effects on the market despite EPA's meager attempts to provide more information.

Biofuel producers, such as members of Petitioner, will be harmed absent a stay. The purpose of the RFS program was to promote biofuel production and incentivize investment. Biofuel producers have taken action in reliance on the volume requirements and Congressional intent. EPA's actions have reduced demand, causing biofuel producers to lose sales and customers. The volatility in the market caused by EPA's actions have caused producers to lose their investments and have impacted their profitability. Those that own RINs have lost the value of those RINs, which, in turn, restrict their ability to continue to invest and grow the program. These are harms that, while economic, are not recoverable and put biofuel producers at very real financial risk if they continue to operate in a market where EPA's actions are artificially devaluing RIN prices. On the other hand, small refineries will not be harmed. They delayed in seeking an extension, and EPA has confirmed, again and again, that small refineries can recover their costs of RINs. Moreover, the statute allows small refineries to claim a deficit as they await action on any request. Indeed, it is not clear whether small refineries have taken any actions to come into compliance in future years, as Congress (and EPA) intended.

A stay is also in the public interest. By expanding the small refinery exemption and failing to adjust for the lost volumes, EPA is reducing the displacement of petroleum-based fuels with renewable fuels. As Congress has recognized, renewable fuels, particularly advanced biofuels, provides environmental benefits. EPA's actions, thus, allow for increases in greenhouse gas emissions, air toxics, and other pollutants that are harmful to the public health. RINs have also provided rural economic benefits, and the reduced demand has had a negative impact on farmers. It also can affect the benefits to consumers, where EPA has consistently found that the RFS program has contributed to lower prices at the pump. This is particularly concerning today given the recent increases in fuel prices. It is also in the public benefit that EPA follows good governance. The closed-door actions by EPA undermine the regulatory process and the public's faith in the government.

Thus, an administrative stay is appropriate and necessary while the Agency considers and addresses the numerous flaws in its handling of the small refinery exemptions. Under 42 U.S.C. § 7607(d), EPA may grant a 90-day stay pending reconsideration, and we respectfully request that

it do so. We also believe that justice requires a stay under 5 U.S.C. § 705.¹⁵ Because of the substantial expansion of exemptions EPA has recently granted, which are clearly not “extensions” under the statute, Petitioner also does not believe EPA is limited by the statutory requirement to respond within 90 days of receiving a request (and many of these petitions have already been pending at EPA for more than 90 days).

Respectfully submitted,

/s/ Jerome C. Muys, Jr.

Jerome C. Muys, Jr.
Muys & Associates, LLC¹⁶
910 17th Street, NW
Suite 800
Washington, DC 20006
T 202 559-2054
F 202 559-2052
jmuys@muyslaw.com

*Counsel for Producers of Renewables United for
Integrity Truth and Transparency*

cc: Daniel Dertke, Esq.
Samara Spence, Esq.
Sandra Franco, Esq.

¹⁵ We believe the ongoing harms caused by EPA’s actions and the clear violations of the statute require the stay be granted immediately. As such, this request should not be deemed as restricting the ability to assert that seeking a stay with the agency would be impracticable.

¹⁶ Mr. Muys was formerly with Sullivan & Worcester LLP.

Message

From: Hengst, Benjamin [Hengst.Benjamin@epa.gov]
Sent: 3/13/2019 1:05:12 AM
To: Bunker, Byron [bunker.byron@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]
CC: Stahle, Susan [Stahle.Susan@epa.gov]
Subject: RE: desk statement on sre decisions
Attachments: 2019.03.13 Roll out and Desk Statement.docx

Byron, Janet—

I was getting ready to send this to Wehrum but made a few edits (primarily adding a timeline up front).

Please take a look when you can, and I'll send this first thing tomorrow. I've requested time on Bill's calendar already (emailed his office around 11) and haven't heard anything back.

Ben

From: Grundler, Christopher
Sent: Tuesday, March 12, 2019 8:48 PM
To: Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Cc: Cohen, Janet <cohen.janet@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>
Subject: Re: desk statement on sre decisions

Got it. Thanks for the explanation

 Christopher Grundler, Director
 Office of Transportation and Air Quality
 U.S. Environmental Protection Agency
 202.564.1682 (Washington DC)
 734.214.4207 (Ann Arbor MI)

Ex. 6 Personal Privacy (PP)

www.epa.gov/otaq

On Mar 12, 2019, at 8:29 PM, Hengst, Benjamin <Hengst.Benjamin@epa.gov> wrote:

Chris—

We are providing advance notice—just the day-of. So we will send an EnviroFlash (which goes to a LOT of addresses, ~4000) in the morning, stating that we will be updating the website at 1pm (or 2pm).

Ex. 5 Deliberative Process (DP)

We may have more updates on all this tomorrow.

Thanks
 Ben

From: Grundler, Christopher
Sent: Tuesday, March 12, 2019 5:46 PM
To: Cohen, Janet <cohen.janet@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Subject: Re: desk statement on sre decisions

Ex. 5 Deliberative Process (DP)

Christopher Grundler, Director
Office of Transportation and Air Quality
U.S. Environmental Protection Agency
202.564.1682 (Washington DC)
734.214.4207 (Ann Arbor MI)

Ex. 6 Personal Privacy (PP)

www.epa.gov/otaq

On Mar 12, 2019, at 5:05 PM, Cohen, Janet <cohen.janet@epa.gov> wrote:

Ben – let me know what else you need. – j. -

<Desk Statement 14 March 2019.docx>

EPA Staff Draft - Deliberative

Plan for March 14, 2019
2017 Small Refinery Exemptions

Timeline

Wednesday, March 13

- All relevant internal stakeholders are made aware of plan for Thursday, March 14

Thursday, March 14

- 9 am: Enviroflash email sent out to multiple fuels stakeholders. Language in EnviroFlash will state that “At 2pm today, EPA will be simultaneously issuing additional determination documents to small refineries that applied for a 2017 exemption, and updating the SRE website to reflect that information.”
- 2pm: EPA emails determinations to refineries, and updates website.

Desk statement for press inquiries

Today (Thursday, May 14, 2019), the Environmental Protection Agency (EPA) updated the Renewable Fuels Standard (RFS) program’s Small Refinery Exemptions webpage ([HYPERLINK "https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions"]) to reflect decisions on five petitions for the 2017 compliance year. The petitions, previously listed as pending, are now shown as granted. The five refineries that received exemptions produced approximately 3.4 billion gallons of gasoline and diesel fuel in 2017, resulting in 366 million Renewable Identification Numbers (RINs) being exempted through these decisions. The total volume of 2017 RINs exempted to date under the Small Refinery Exemption provisions is approximately 1.8 billion RINs.

Additional background:

To increase transparency around the RFS program, last year EPA began posting information showing the number of small refinery exemption petitions, the status of those petitions (grant, denial, ineligible/withdrawn, or pending), the volume of exempted fuel and the volume of exempted RINs. We also stated: *“EPA intends to coordinate the timing of future small refinery exemption decisions and updates to this RFS data website such that refineries receiving exemptions and other interested parties receive the same RIN market information at the same time.”*

Because we are updating the RFS data webpage on a nonstandard day (normally RFS data is updated once per month on the third Thursday of the month), we will be sending e-mails to RFS stakeholders that have registered with our RFS Listserver, a process called an “Enviroflash.” The Enviroflash will say the following:

Subject: Notice of EPA’s Intent to Update RFS Small Refinery Exemption Data

EPA Staff Draft - Deliberative

The Environmental Protection Agency ("EPA") intends to issue a number of 2017 small refinery exemption decisions today (Thursday, May 14, 2019) at 1 PM EDT and will update the RFS Small Refinery Exemptions webpage ([HYPERLINK "https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions"]) to reflect these decisions. Each petitioning refinery will receive concurrent notice of its individual decision.

Expected Questions and Answers:

Q1: Last year, thirteen US Senators wrote to then Administrator Pruitt asking EPA to cease issuing any small refinery exemptions under the RFS. Why is EPA continuing to issue these exemptions?

A1: EPA is required by statute to implement the small refinery exemption provisions and we must continue to manage the program consistent with the law. We understand the frustration that many stakeholders have with what can seem to be an opaque program. The transparency steps that we took last year and the data we are posting today are responsive to the requests of these Senators.

Q2: A recent Reuters article summarizing a court filing by the Advanced Biofuels Association (ABFA) says that EPA has issued 24 decisions granting exemptions where DOE scored the viability portion of its matrix a zero, meaning compliance with the RFS would have no impact on the small refinery's ability to stay competitive and profitable. But the EPA still granted the exemptions. Has EPA continued that practice with these latest decisions?

A2: We cannot comment on ongoing litigation or specific small refinery exemption decisions. Each individual Small Refinery exemption decision is based upon the specific facts of the petition. However, we can say that where DOE has found a basis to recommend relief (even 50 percent relief), EPA too has generally found it appropriate to grant relief.

Q3: When will EPA issue the other pending 2017 and 2018 decisions?

A3: EPA is working with DOE to as quickly as possible evaluate the remaining petitions for 2017 and 2018 and to issue decisions. At this time, it is likely that the majority of the 2018 decisions will be issued after the 2018 compliance deadline of March 31, 2019. The small refineries awaiting decisions can carry a deficit for the 2018 compliance year, which will automatically extend the deadline for their 2018 obligation to March 31, 2020.

Q4: Your website indicates that there are still two pending 2017 petitions. Why weren't those decisions issued today with the others? When will they be issued?

EPA Staff Draft - Deliberative

A4: EPA cannot comment on specific circumstances surrounding specific petitions. EPA is working as quickly as possible evaluate the remaining 2017 petitions and to issue decisions.

Q5: Why is EPA only now issuing 2017 petition decisions when the 2017 compliance deadline of March 31, 2018 passed almost a year ago?

A5: The exemption petitions that EPA is acting on now were submitted well after the compliance deadline.

Q5: Given the very late 2017 decisions, will EPA be giving the hardship recipients new 2019 RINs?

A5: No. The companies receiving these 2017 grants had previously complied and EPA will be returning the RINs the companies submitted for that compliance. EPA will not be issuing new RINs.

Q6: Why hasn't EPA acted on the pending 2018 petitions?

A6: The 35-day government shutdown and the need to carefully evaluate these petitions in the context of recent court decisions has delayed the evaluation by DOE and decision making process at EPA longer than we would like. However, we would note that these petitioners can carry a deficit for the 2018 compliance year without any penalty effectively making the deadline to satisfy their 2018 obligation or receive relief from EPA March 31, 2020.

Q7: Given the very late decisions will EPA delay the 2018 compliance deadline?

A7: No. Parties that wish to extend the deadline can do so on their own by carrying a 2018 deficit forward which will have the effect of extending their 2018 compliance deadline to March 31, 2020.

Message

From: Burch, Julia [Burch.Julia@epa.gov]
Sent: 5/14/2019 3:38:36 PM
To: Cohen, Janet [cohen.janet@epa.gov]
CC: Meekins, Tanya [Meekins.Tanya@epa.gov]
Subject: FW: Loeb sack letter
Attachments: AL-18-000-8567_incoming Loeb sack SREs.pdf; ATT00001.htm

Per your request, see Clint's suggested language for closing out the Loeb sack SRE letter below. Tanya and I will take care of this in the IO but feel free to use this language for similar controls.

From: Woods, Clint
Sent: Friday, May 10, 2019 12:24 PM
To: Harlow, David <harlow.david@epa.gov>; Cyran, Carissa <Cyran.Carissa@epa.gov>; Lubetsky, Jonathan <Lubetsky.Jonathan@epa.gov>; Burch, Julia <Burch.Julia@epa.gov>
Subject: Fwd: Loeb sack letter

Ex. 5 Deliberative Process (DP)

Begin forwarded message:

From: "Woods, Clint" <woods.clint@epa.gov>
Date: April 18, 2019 at 1:52:55 PM EDT
To: "Lyons, Troy" <lyons.troy@epa.gov>, "Voyles, Travis" <Voyles.Travis@epa.gov>, "Rodrick, Christian" <rodrick.christian@epa.gov>, "Frye, Tony (Robert)" <frye.robert@epa.gov>
Cc: "Dominguez, Alexander" <dominguez.alexander@epa.gov>, "Schwab, Justin" <Schwab.Justin@epa.gov>
Subject: Fwd: Loeb sack letter

All,

Ex. 5 Deliberative Process (DP)

Thanks!

Begin forwarded message:

From: "Bunker, Byron" <bunker.byron@epa.gov>
To: "Woods, Clint" <woods.clint@epa.gov>
Subject: FW: Loeb sack letter

Hi Clint,

Attached is the SRE letter I briefly mentioned. **Ex. 5 Deliberative Process (DP)**
Ex. 5 Deliberative Process (DP)

Thanks,

Byron

Byron Bunker
 Director Compliance Division
 Office of Transportation and Air Quality
 Environmental Protection Agency
 2000 Traverwood Drive
 Ann Arbor, MI 48105
Bunker.Byron@epa.gov
 Phone: (734) 214-4155

Ex. 6 Personal Privacy (PP)

From: Hengst, Benjamin
Sent: Friday, April 12, 2019 9:29 PM
To: Bunker, Byron <bunker.byron@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>;
 Meekins, Tanya <Meekins.Tanya@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>;
 Parsons, Nick <Parsons.Nick@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>;
 Michaels, Lauren <Michaels.Lauren@epa.gov>
Cc: Mroz, Jessica <mroz.jessica@epa.gov>; Meekins, Tanya <Meekins.Tanya@epa.gov>
Subject: Loeb sack letter

Hi SRE team:

You have done a great job in reducing the # of SRE-related letters in our queue. The only Congressional letter left is the Loeb sack letter. I've done a thorough scrub/re-working letter of this, and at this point we *really* need to finish this up. OCIR is very, very much wanting to get this out.

At this point, I think this only needs a quick look from OGC and OTAQ. Can folks please edit the attached and circulate? Once Byron says this is good to go, then Jessie can make sure Tanya gets it to OCIR (Karen T.). I've tried to make it as up-to-date as possible, and I've gone back to look at all the various edits/comments made over the past several months. At this point, I'm hoping it needs only minor tweaking.

Thanks,
 Ben

Message

From: Nelson, Karen [nelson.karen@epa.gov]
Sent: 8/22/2019 4:59:04 PM
To: Hengst, Benjamin [Hengst.Benjamin@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]
Subject: RE: really! Last call for comments on SRE one pager
Attachments: 8.22.19 Detailed Background on RIN Refunds for 2018 SRE grants.docx

Hi Ben, here is the longer version (4 page) of the information packet for SREs.

It's got the same content as before, but I rearranged it a bit.

Thanks, and sorry for the late transmission!
 -Karen

From: Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Sent: Thursday, August 22, 2019 12:31 PM
To: Cohen, Janet <cohen.janet@epa.gov>
Cc: Nelson, Karen <nelson.karen@epa.gov>
Subject: RE: really! Last call for comments on SRE one pager

Great—thank you

From: Cohen, Janet <cohen.janet@epa.gov>
Sent: Thursday, August 22, 2019 12:23 PM
To: Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Cc: Nelson, Karen <nelson.karen@epa.gov>
Subject: really! Last call for comments on SRE one pager

Hi Ben. Here's the one (two) page version. I'm not exactly sure what the current version of the longer piece is so I'm asking Karen to run that down and send it to you. I've been flexiplacing this morning, leaving now to come in for the 1 pm call. – j. -

From: Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Sent: Thursday, August 22, 2019 11:47 AM
To: Cohen, Janet <cohen.janet@epa.gov>
Subject: RE: This time really! Last call for comments on SRE one pager

For some reason I can't access this—can you please email it to me? Thanks!

From: Cohen, Janet <cohen.janet@epa.gov>
Sent: Thursday, August 22, 2019 11:41 AM
To: Stahle, Susan <Stahle.Susan@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Piotrowski, Greg <piotrowski.greg@epa.gov>; McKenna, Chris <McKenna.Chris@epa.gov>; Spencer, Mark <spencer.mark@epa.gov>
Cc: Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>
Subject: RE: This time really! Last call for comments on SRE one pager

Thanks. We are going to keep this one for all the good background but I'm now preparing a much shorter summary version to use today, if it comes to that. – j. -

From: Stahle, Susan <Stahle.Susan@epa.gov>
Sent: Thursday, August 22, 2019 11:34 AM
To: Cohen, Janet <cohen.janet@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Piotrowski, Greg <piotrowski.greg@epa.gov>; McKenna, Chris <McKenna.Chris@epa.gov>; Spencer, Mark <spencer.mark@epa.gov>
Cc: Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>
Subject: RE: This time really! Last call for comments on SRE one pager

A few edits/comments attached.

Susan Stahle
 Air and Radiation Law Office
 Office of General Counsel
 U.S. Environmental Protection Agency
 WJCN-7502B
 202-564-1272

From: Cohen, Janet <cohen.janet@epa.gov>
Sent: Thursday, August 22, 2019 10:43 AM
To: Parsons, Nick <Parsons.Nick@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Piotrowski, Greg <piotrowski.greg@epa.gov>; McKenna, Chris <McKenna.Chris@epa.gov>; Spencer, Mark <spencer.mark@epa.gov>
Cc: Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Subject: This time really! Last call for comments on SRE one pager
Importance: High

Ok, really, one last time I hope, then I'll send paper (now a 3 pager I think) to Ben to have in back pocket for later if we need it.

John/Nick/Jung – **Ex. 5 Deliberative Process (DP)**

All – I left in a couple of comments so you could see what's behind changes. Otherwise tried to clean everything up. Last question, **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP)

Current version is attached and linked [here](#).

- J. -

From: Parsons, Nick <Parsons.Nick@epa.gov>
Sent: Wednesday, August 21, 2019 4:21 PM
To: Stahle, Susan <Stahle.Susan@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Piotrowski, Greg <piotrowski.greg@epa.gov>; McKenna, Chris <McKenna.Chris@epa.gov>; Spencer, Mark <spencer.mark@epa.gov>
Cc: Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Subject: RE: Last call for comments on SRE one pager

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

- Nick

From: Stahle, Susan <Stahle.Susan@epa.gov>

Sent: Wednesday, August 21, 2019 2:49 PM

To: Parsons, Nick <Parsons.Nick@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Piotrowski, Greg <piotrowski.greg@epa.gov>; McKenna, Chris <McKenna.Chris@epa.gov>; Spencer, Mark <spencer.mark@epa.gov>

Cc: Hengst, Benjamin <Hengst.Benjamin@epa.gov>

Subject: RE: Last call for comments on SRE one pager

Ex. 5 Deliberative Process (DP)

Susan Stahle
Air and Radiation Law Office
Office of General Counsel
U.S. Environmental Protection Agency
WJCN-7502B
202-564-1272

From: Parsons, Nick <Parsons.Nick@epa.gov>

Sent: Wednesday, August 21, 2019 2:44 PM

To: Stahle, Susan <Stahle.Susan@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Piotrowski, Greg <piotrowski.greg@epa.gov>; McKenna, Chris <McKenna.Chris@epa.gov>; Spencer, Mark <spencer.mark@epa.gov>

Cc: Hengst, Benjamin <Hengst.Benjamin@epa.gov>

Subject: RE: Last call for comments on SRE one pager

Ex. 5 Deliberative Process (DP)

- Nick

From: Stahle, Susan <Stahle.Susan@epa.gov>

Sent: Wednesday, August 21, 2019 2:39 PM

To: Cohen, Janet <cohen.janet@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Piotrowski, Greg <piotrowski.greg@epa.gov>; McKenna, Chris <McKenna.Chris@epa.gov>; Spencer, Mark <spencer.mark@epa.gov>

Cc: Hengst, Benjamin <Hengst.Benjamin@epa.gov>

Subject: RE: Last call for comments on SRE one pager

Janet –

I am having trouble editing and saving those edits to the Sharepoint version of this document.

Is there a chance you could share a new, clean version of the document you intend to send up so I could look at that version?

I will note the version I was trying to read is very long and seems to contain a lot of repetitive material. I wonder if that is the right document?

Ex. 5 Deliberative Process (DP)

Susan Stahle
Air and Radiation Law Office
Office of General Counsel
U.S. Environmental Protection Agency
WJCN-7502B
202-564-1272

From: Cohen, Janet <cohen.janet@epa.gov>

Sent: Wednesday, August 21, 2019 2:23 PM

To: Parsons, Nick <Parsons.Nick@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Piotrowski, Greg <piotrowski.greg@epa.gov>; McKenna, Chris <McKenna.Chris@epa.gov>; Spencer, Mark <spencer.mark@epa.gov>

Cc: Hengst, Benjamin <Hengst.Benjamin@epa.gov>

Subject: Last call for comments on SRE one pager

I plan to send to OTAQ Materials at 3 pm. – j. -

No. 18-1202

**UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT**

PRODUCERS OF RENEWABLES UNITED FOR INTEGRITY TRUTH AND TRANSPARENCY,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

and

HOLLYFRONTIER REFINING & MARKETING LLC, HOLLYFRONTIER CHEYENNE
REFINING LLC, SINCLAIR WYOMING REFINING CO., AND SINCLAIR CASPER REFINING
Co.,

Intervenors-Respondents.

On Petition for Review of Final Agency Actions of the U.S. Environmental
Protection Agency

BRIEF OF INTERVENORS-RESPONDENTS

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DATED: March 11, 2019

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Under Circuit Rule 28(a)(1), Intervenor-Respondents provide the following list of parties to this case, rulings under review, and related cases:

1. Parties and Amici

The Brief for Petitioner Producers of Renewables United for Integrity Truth and Transparency (PRUITT) lists all parties, intervenors, and amici.

2. Rulings Under Review

As discussed in this Brief, Intervenor-Respondents disagree with PRUITT and the U.S. Environmental Protection Agency (EPA) over the scope of the rulings under review. In particular, Intervenor-Respondents do not believe that PRUITT's Petition for Review adequately identified the following five informal adjudications:

- Grant of Request for Extension of Small Refinery Temporary Exemption Under the Renewable Fuel Standards Program for Sinclair Casper Refining Company's Sinclair Casper Refinery, Dec. 20, 2017;
- Grant of Request for Extension of Small Refinery Temporary Exemption Under the Renewable Fuel Standards Program for Sinclair Casper Refining Company's Sinclair Casper Refinery, Dec. 21, 2017;
- Grant of Request for Extension of Small Refinery Temporary Exemption Under the Renewable Fuel Standards Program for Sinclair Wyoming Refining Company's Sinclair Wyoming Refinery, Dec. 20, 2017;
- Grant of Request for Extension of Small Refinery Temporary Exemption Under the Renewable Fuel Standards Program for Sinclair Wyoming Refining Company's Sinclair Wyoming Refinery, Dec. 21, 2017;

- Grant of Request for Extension of Small Refinery Temporary Exemption Under the Renewable Fuel Standards Program for HollyFrontier Cheyenne Refining LLC's Cheyenne, WY Refinery, Jan. 24, 2018.

Petitioner also seeks review of a regulation, 40 C.F.R. § 80.1441, and four final rulemakings:

- Regulation of Fuel and Fuel Additives: Changes to Renewable Fuel Standard Program, 75 Fed. Reg. 14,670 (Mar. 26, 2010);
- Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017, 80 Fed. Reg. 77,420 (Dec. 14, 2015);
- Renewable Fuel Standard Program: Standards for 2017 and Biomass-Based Diesel Volume for 2018, 81 Fed. Reg. 89,746 (Dec. 12, 2016);
- Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019, 82 Fed. Reg. 58,486 (Dec. 12, 2017).

3. Related Cases

This case has not been before this Court or any other court. However, the U.S. Court of Appeals for the Tenth Circuit vacated and remanded final EPA actions related to the five Requests for Extension of Small Refinery Temporary Exemption Under the Renewable Fuel Standards Program listed above in *Sinclair Wyoming Refining Co. v. EPA*, 887 F.3d 986 (10th Cir. 2017), *Sinclair Wyoming Refining Co. v. EPA*, Case No. 16-9561 (10th Cir.), and *HollyFrontier Refining v. EPA*, Case No. 16-9564 (10th Cir.).

The following cases involve the same rulemakings for which Petitioner seeks review in this case:

a. Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel

Standard Program, published at 75 Fed. Reg. 14,670 (Mar. 26, 2010).

- *National Petrochemical & Refiners Association v. EPA*, 630 F.3d 145 (D.C. Cir. 2010), *reh'g en banc denied*, 643 F.3d 958 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 571 (2011);
- *National Chicken Council v. EPA*, 687 F.3d 393 (D.C. Cir. 2012);
- *National Biodiesel Board v. EPA*, 843 F.3d 1010 (D.C. Cir. 2016);
- *Alon Refining Krotz Springs v. EPA*, No. 16-1052 (and consolidated cases) (D.C. Cir. docketed Feb. 12, 2016);
- *Renewable Fuels Association v. EPA*, No. 18-1154 (D.C. Cir. docketed June 4, 2018).

b. Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016

and Biomass-Based Diesel Volume for 2017, 80 Fed. Reg. 77,420 (Dec. 14, 2015).

- *Americans for Clean Energy v. EPA*, 864 F.3d 691 (D.C. Cir. 2017);
- *Alon Refining Krotz Springs v. EPA*, No. 16-1052 (and consolidated cases) (D.C. Cir., docketed Feb. 12, 2016).

c. Renewable Fuel Standard Program: Standards for 2017 and Biomass-

Based Diesel Volume for 2018, 81 Fed. Reg. 89,746 (Dec. 12, 2016).

- *Coffeyville Resources Refining & Marketing, LLC v. EPA*, No. 17- 1044 (and consolidated cases) (D.C. Cir., docketed Feb. 9, 2017).

d. Renewable Fuel Standard Program: Standards for 2018 and Biomass-

Based Diesel Volume for 2019, 82 Fed. Reg. 58,486 (Dec. 12, 2017).

- *American Fuel & Petrochemical Manufacturers v. EPA*, No. 17-1258 (and consolidated cases) (D.C. Cir.), argument held February 20, 2019.
- *Growth Energy v. EPA*, No. 19-1023 (D.C. Cir., docketed Feb. 4, 2019).

e. Regulation of Fuels and Fuel Additives: 2012 Renewable Fuel Standards, 77 Fed. Reg. 1320 (Jan. 9, 2012).

- *American Petroleum Institute v. EPA*, 706 F.3d 474 (D.C. Cir. 2013).

CORPORATE DISCLOSURE STATEMENT UNDER FED. R. APP. P. 26.1

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, HollyFrontier Refining & Marketing LLC and HollyFrontier Cheyenne Refining LLC hereby state that each is a wholly owned subsidiary of HollyFrontier Corporation, which is a publicly held company. HollyFrontier Corporation is a Delaware corporation with its principal place of business in Dallas, Texas. No other publicly held company has a 10% or greater ownership interest in HollyFrontier Refining & Marketing LLC and HollyFrontier Cheyenne Refining LLC.

HollyFrontier Refining & Marketing LLC and HollyFrontier Cheyenne Refining LLC are both limited liability companies formed under the laws of the State of Delaware. Both have their principal place of business located at 2828 North Harwood, Suite 1300, Dallas, Texas 75201.

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Sinclair Wyoming Refining Company and Sinclair Casper Refining Company certify they are wholly owned subsidiaries of Sinclair Oil Corporation, which is a wholly owned subsidiary of The Sinclair Companies. The Sinclair Companies is a privately held corporation with no parent corporation. Sinclair Wyoming Refining Company and Sinclair Casper Refining Company are in the business of refining crude petroleum into refined products, primarily diesel and gasoline.

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GLOSSARY OF ABBREVIATIONS

DOE	Department of Energy
EPA	Environmental Protection Agency
PRUITT	Producers of Renewables United for Integrity Truth and Transparency
RFS	Renewable Fuel Standard
RIN	Renewable Identification Numbers
SCR	Sinclair Casper Refining Company
SWR	Sinclair Wyoming Refining Company

INTRODUCTION

Through its Petition, PRUITT attempts to transform individual remedies given by EPA to facilities in Wyoming into a broader attack on EPA and the Renewable Fuel Standard (RFS) program. Numerous jurisdictional doctrines and venue provisions preclude such an effort.

As an initial matter, PRUITT has failed to establish its standing to mount the challenge it seeks. PRUITT had to present evidence that it was or certainly would be harmed by EPA's actions. Instead, PRUITT provided only speculation. PRUITT discusses market trends under the RFS and asserts that certain actions have had a market-wide effect. But it never ties any of those effects to the particular EPA actions under review. It fails to explain how any particular member suffered a distinct and identifiable injury from EPA's decisions, or how a member will face a certainly impending injury. For all its allegations of market impacts and suffering of PRUITT members, PRUITT ignores the fundamental principle that "[s]tanding is not 'an ingenious academic exercise in the conceivable,' but ... requires ... a factual showing of perceptible harm." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 566 (1992).

Even apart from standing, PRUITT faces several jurisdictional defects. Its Petition failed to identify the final agency action it seeks to challenge, and any challenge to the agency action that EPA and PRUITT now assume is at issue is

untimely. A party challenging EPA action must do so within sixty days, but PRUITT filed its Petition well after that time period for the rulemakings identified in its brief. Nor can PRUITT claim any grounds-arising-after basis for ignoring the express timing limitations of the Clean Air Act. Nothing that PRUITT challenges signifies a legal change; at most, PRUITT challenges the discrete application of existing statutory and regulatory provisions. Critically, to the extent PRUITT challenges anything, it challenges particular small-refinery exemptions for facilities in Wyoming. Those individual exemptions are not nationwide in scope, so any challenge to them cannot be heard in this Court. As locally or regionally applicable actions, they may be challenged only in the Tenth Circuit.

Even if this Court were to reach the merits, PRUITT's claims that EPA has acted illegally fare no better. In its exemption decisions, EPA provided a unique remedy to individual facilities on remand from the Tenth Circuit and in light of delays caused by litigation. EPA's discretionary authority to administer a program is at its height when issuing a remedy. It was appropriate for EPA to do so through informal adjudications affecting only the facilities facing these unique circumstances, and nothing in EPA's decision could be considered arbitrary or capricious.

The Court should dismiss the Petition or, in the alternative, deny it.

STATUTES AND REGULATIONS

Except for 40 C.F.R. §§ 80.1451-80.1452, the Briefs for Petitioner and Respondent contain all applicable statutes and regulations.

STATEMENT OF THE CASE

I. Statutory and Regulatory Framework

A. Congress's Enactment of the Renewable Fuel Standard Program and Instruction to EPA to Oversee It

Congress created the RFS Program in section 211 of the Clean Air Act, 42 U.S.C. § 7545(o). The RFS Program principally requires obligated parties, among other things, to blend certain renewable fuels into their transportation fuels. 42 U.S.C. § 7545(o).

Under the RFS Program, Congress sets annual targets for the nationwide volume of renewable fuel to be blended by obligated parties. EPA ultimately determines the annual obligation for each year as a percentage standard, and codifies the standards in its regulations. 40 C.F.R. § 80.1405. The percentages represent the ratio of renewable fuel volume to projected non-renewable gasoline and diesel volume, and they are applied to each obligated party to determine individual RFS obligations. 40 C.F.R. § 80.1407. The renewable volume requirements are predictive and, because they are set in terms of a percentage, they vary as a result of the amount of fuel produced or imported. Thus, an actual annual

obligation (in terms of actual gallons of renewable fuel rather than a percentage standard) cannot be calculated until the completion of a calendar year.

To comply with the RFS, an obligated party need not blend renewable fuel itself. Instead, it may obtain credits from others that blended more fuel than their obligation required. These credits are termed renewable identification numbers, or RINs, and are generated for each gallon of renewable fuel produced for use in the United States. *See* 40 C.F.R. § 80.1426(a). The RIN is separated from the renewable fuel once that renewable fuel is blended into transportation fuel or exported. *Id.* §§ 80.1426(e), 80.1429(b). The RIN-separating party may elect to keep the RIN to satisfy its own obligation, or to sell it. 42 U.S.C. § 7545(o)(5)(B)-(C); 40 C.F.R. §§ 80.1427(a)(6), 80.1451. At the end of the compliance year, each obligated party must demonstrate its compliance with the RFS Program by “retiring” RINs sufficient to meet its individual obligation. *Id.* § 80.1427(a)(1).¹

B. Congress’s Built-In Protections for Small Refineries

In enacting the RFS Program, Congress recognized that small refineries—those with an average annual throughput of 75,000 barrels per day or crude oil or less—may face far greater difficulty complying with the program than other obligated parties. *See* 42 U.S.C. §§ 7545(o)(1)(K), 7545(o)(9). Small refineries

¹ Each RIN has a unique number that represents various facets about its creation. 40 C.F.R. § 80.1425. EPA’s Moderated Transaction System tracks RINs. *Id.* § 80.1452.

have less capacity to blend renewable fuels and so may experience a disproportionate need to purchase credits from others in order to meet their RIN obligations. *Cf. Hermes Consol. LLC v. EPA*, 787 F.3d 568, 572 (D.C. Cir. 2015).

To ease the burden on small refineries, Congress established a three-tier “exemption” process. First, Congress exempted all small refineries from the RFS Program’s obligations through 2010. *See* 42 U.S.C. § 7545(o)(9)(A)(i). Second, Congress directed the Department of Energy to study the economic burden that compliance with the RFS Program would impose on small refineries. *Id.* § 7545(o)(9)(A)(ii)(I). Specifically, Congress instructed the DOE “to determine whether compliance ... would impose a disproportionate economic hardship on small refineries.” *Id.* If a small refinery would face such a hardship under DOE’s study, EPA was required to extend the exemption to that refinery for at least another two years. *Id.* § 7545(o)(9)(A)(ii)(II). Third, and most relevant here, Congress authorized EPA to grant an exemption to a small refinery “at any time ... for the reason of disproportionate economic hardship.” *Id.* § 7545(o)(9)(B)(i).

Generally, EPA grants individual hardship exemptions in one-year periods. Most exemption decisions are issued at the end of or after the compliance deadline for a given year because EPA requires the small refinery to demonstrate economic hardship by submitting financial information from at least the first three quarters of the compliance year. *See* EPA, Financial and Other Information to Be Submitted

With 2016 RFS Small Refinery Hardship Exemption Requests (Dec. 6, 2016), <https://www.epa.gov/sites/production/files/2016-12/documents/rfs-small-refinery-2016-12-06.pdf>. If EPA grants an exemption after the March 31 compliance deadline, it affords the small refinery requisite relief by unretiring any RINs that the refinery previously retired during the compliance year for which it is later exempted. *See* Decl., EPA Opp. to Stay Motion, Doc. Nos. 1762681 (public) & 1762885 (sealed), ¶¶ 11-13.

II. Factual Background

A. EPA's Administration of the RFS Program

As directed by Congress, EPA has administered the RFS Program by, among other things, promulgating various regulations governing the operation and administration of that program. This includes rules promulgated in 2010, 75 Fed. Reg. 14,670 (Mar. 26, 2010) (codified at 40 C.F.R. § 80.1441) (JA___), as well as annual fuel volumes set for 2014-2018, 82 Fed. Reg. 58,486 (Dec. 12, 2017) (JA___); 81 Fed. Reg. 89,746 (Dec. 12, 2016) (JA___); 80 Fed. Reg. 77,420 (Dec. 14, 2015) (JA___).

B. EPA's Remedy to Sinclair and HollyFrontier on Remands from the Tenth Circuit

Sinclair Casper Refining Company (SCR), Sinclair Wyoming Refining Company (SWR, and collectively with SCR, Sinclair), and HollyFrontier Cheyenne Refining, LLC (HollyFrontier) are small refineries under 42 U.S.C.

§ 7545(o)(1)(K). Faced with various adverse economic conditions that made complying with the RFS Program a disproportionate economic hardship, each of these small refineries sought hardship exemptions.

SCR petitioned EPA for a small-refinery exemption for its 2014 RFS obligation. *See* Decl., EPA Opp. to Stay Motion, Doc. Nos. 1762681 (public) & 1762885 (sealed), Attach. A (JA___). SWR also sought a 2014 exemption. *Id.*, Attach. C (JA___). EPA denied Sinclair’s petitions on May 2, 2016. *Id.*, Attach. A, C (JA___).

Both Sinclair facilities further sought exemptions for 2015. *See id.*, Attach. B, D (JA___, ___). Additionally, HollyFrontier Refining and Marketing, LLC petitioned EPA for a 2015 exemption for HollyFrontier’s Cheyenne refinery. *Id.*, Attach. E (JA___). EPA denied Sinclair’s petitions on October 19, 2016, and HollyFrontier’s on November 3, 2016.

HollyFrontier and Sinclair each petitioned the Tenth Circuit for review of EPA’s denials. *Id.*, Attach. A-E (JA___-___). In *Sinclair Wyoming Refining Company v. EPA*, the Tenth Circuit held that EPA, in the context of denying Sinclair’s petitions for 2014, had interpreted “disproportionate economic hardship” too stringently by requiring refineries to demonstrate an existential threat to their viability. *See* 887 F.3d 986, 999 (10th Cir. 2017). This standard violated the plain meaning of the statute. *See id.* Consequently, the Tenth Circuit vacated and

remanded EPA's decisions denying Sinclair's 2014 petitions. Doc. 1762885, Attach. A-B (JA __, __). Because EPA denied Sinclair's and HollyFrontier's 2015 small-refinery exemption petitions on the same ground, the Tenth Circuit vacated and remanded EPA's decisions denying those petitions. *Id.*, Attach. B, D-E (JA __, __-__).

C. EPA's Grants of Exemptions on Remand

On remand from the Tenth Circuit, EPA applied a different standard and concluded that Sinclair and HollyFrontier were entitled to the small-refinery exemption. *See id.*, Attach. A-E (JA __, __, __, __, __). EPA agreed that Sinclair's and HollyFrontier's exemption petitions "[redacted] [redacted]" which can include "[redacted] [redacted]" *E.g.*, *id.*, Attach. A (JA __). It further explained that adverse structural conditions can include "[redacted] [redacted]". *Id.* EPA found "[redacted] [redacted]" existed for each refinery. *Id.*

Having determined that the refineries deserved exemptions, EPA turned to the appropriate remedy. EPA recognized that Sinclair and HollyFrontier requested exemptions "[redacted] [redacted]". *Id.* However, EPA's improper standard and the ensuing litigation would render 2015 RINs worthless. *Id.* That is, each facility had

accumulated sufficient RINs to meet its 2014 and/or 2015 obligations, but if EPA had simply returned those retired RINs, they would have been [REDACTED] because they could not be used. *Id.* The agency recognized that it needed to find another way to provide an adequate remedy.

Accordingly, EPA used its [REDACTED]
[REDACTED] *Id.* It did so by striving to [REDACTED]
[REDACTED] had the exemptions been issued
before *Sinclair*. *Id.* In other words, EPA utilized its discretion [REDACTED]
[REDACTED]
[REDACTED] *Id.* (citing *Shays v.*
FEC, 528 F.3d 914, 9330 (D.C. Cir. 2008)). Thus, it would [REDACTED]
[REDACTED]
[REDACTED] *Id.* To accomplish this, EPA
would enable Sinclair and HollyFrontier to obtain [REDACTED]
[REDACTED]
[REDACTED] *Id.*

Hardship petitions rely on confidential business information, and therefore, under EPA regulations, EPA could not disclose its decisions publicly. *See* 40 C.F.R. part 2, subpart B; *see also Sinclair*, 887 F.3d at 999.

SUMMARY OF THE ARGUMENT

The Court lacks jurisdiction to entertain PRUITT's Petition. At the outset, PRUITT lacks standing, because it has not demonstrated with evidence that it or any of its members have been, or will be, harmed by EPA's decisions. Its theory of standing relies on unsubstantiated allegations and conjecture.

The Petition furthermore improperly challenges general policies without identifying specific final agency action. And PRUITT did not contemporaneously file any documents that could cure this lack of specificity. EPA's assumption that PRUITT challenges the informal adjudication decisions EPA lodged in the record does not cure the Petition's jurisdictional defect.

PRUITT's challenge is also untimely. The Clean Air Act provides a 60-day limitation period to challenge agency action. 42 U.S.C. § 7607(b)(1). PRUITT's challenge to years-old EPA rulemakings is untimely under this standard, and PRUITT does not present valid grounds arising after to permit jurisdiction. Its assertion that EPA's grant of "retroactive" exemptions changes the law fails to account for EPA's historical practices, rules stating that EPA would grant such exemptions, and the statutory text allowing small refineries to petition for exemptions "at any time." *Id.* § 7545(o)(9).

To the extent these jurisdictional hurdles are met, PRUITT's challenge failed to satisfy the procedural requirements for bringing a case based on "grounds

arising after,” because EPA has not yet resolved a pending petition for reconsideration that PRUITT filed the same day as it petitioned this Court for review.

Finally, even if this Court could get past these jurisdictional defects, it would be the wrong court to hear the merits. The Petition challenges EPA’s remedy at the end of an informal adjudication. The remedy affects three small refineries in Wyoming. Thus, EPA’s final action is “locally or regionally applicable” and, therefore, “may be filed only in the United States Court of Appeals for the appropriate circuit.” *Id.* § 7607(b)(1). Here, that court would be the Tenth Circuit.

On the merits, the issue before the Court is whether EPA acted within its discretion when it crafted this limited remedy for three small refineries. Agencies may determine policy through informal adjudication. *See Shays*, 528 F.3d at 930. When they do so to issue remedies, their discretion is at its peak. *Niagara Mohawk Power Corp. v. Fed. Power Comm’n*, 379 F.2d 153, 159 (D.C. Cir. 1967). EPA was well within its discretion when, having caused the refineries to retire credits unnecessarily several years prior, it replaced those refineries’ credits to make them whole. PRUITT’s mischaracterizations of EPA’s decisions should not detract from the simple reality of this case: EPA’s actions fell within its discretion to manage the RFS Program.

ARGUMENT

I. This Court Lacks Jurisdiction over the Petition.

PRUITT attempts to challenge various agency actions, including a regulation promulgated in 2010, the annual fuel volumes set in 2014-2016, and five informal adjudications decided in December 2017 and January 2018. The Court lacks jurisdiction over any of these challenges. As an initial matter, PRUITT has not establish its standing. *See infra* I.A. And its Petition challenges general policies without properly identifying final agency action it now purports to challenge. *See infra* I.B.

Even if PRUITT had standing or had identified final agency action, its Petition is untimely. On one hand, PRUITT did not file its Petition within 60 days of the rulemakings it seeks to challenge, and PRUITT seeks review with no grounds-arising-after basis. *See infra* I.C. On the other hand, if PRUITT asserts that EPA amended its regulations through informal adjudication, the Court must hold the Petition in abeyance until EPA acts on PRUITT's petition for reconsideration. *See infra* I.D.

Finally, the Court lacks jurisdiction over the individual adjudications because PRUITT has petitioned the wrong court. Venue, to the extent it lies anywhere, lies in the Tenth Circuit, not this Court. *See infra* I.E.

A. PRUITT Has Failed to Establish Standing.

PRUITT bears the burden of establishing standing and, therefore, the Court's jurisdiction. *See Air Alliance Houston v. EPA*, 906 F.3d 1049, 1057-58 (D.C. Cir. 2018). PRUITT's theory of standing is that EPA's actions "have reduced the need" for obligated parties "to purchase physical gallons of biofuel to meet the RFS." Pet. Br. 18. According to PRUITT, this has consequences: because PRUITT's members "have relied on the volumes set by EPA," reduced need means PRUITT's members "have lost sales, lost value for their product under previously entered contracts, lost customers, and, in some cases, have had to strand investments, as a result of EPA's actions and lost demand." *Id.* In addition, PRUITT asserts that "EPA's actions also reduced RIN prices." *Id.*

PRUITT has not substantiated the basic elements of standing: (1) that its members have "suffered an 'injury in fact,' (2) that the injury is 'fairly traceable' to the challenged action of the defendant, and (3) that it is 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 174 (D.C. Cir. 2012) (quoting *Lujan*, 504 U.S. at 560-61).

First, PRUITT has not demonstrated through record or other evidence that it or any of its members has suffered any concrete, particularized injury from EPA's decision to replace the RINs Sinclair or HollyFrontier retired to comply with

obligations for which they were exempt. *See, e.g., DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006); *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002) (petitioner “must either identify ... record evidence sufficient to support its standing to seek review or, if there is none because standing was not an issue before the agency, submit additional evidence to the court of appeals”); *see also Warth v. Seldin*, 422 U.S. 490, 511 (1975).

PRUITT speculates that EPA’s issuance of replacement RINs has dramatically affected the market by decreasing demand for and prices of renewable fuels and RINs. Notably, however, PRUITT never ties this allegation to the individual determinations for Sinclair or HollyFrontier, offering instead no more than a broad, macro analysis of the RIN market. *See* Pet. Br. 17-18; Pet. Br. Addendum, Cain Decl. ¶¶ 16-17, 31; *see generally* Pet. Motion for Prot. Order, Doc. Nos. 1759744 (public) & 1759893 (sealed), DeAngelis Decl.² PRUITT fails to identify any basis for attributing market-wide fluctuations in RIN prices to the limited number of replacement RINs EPA issued to Sinclair and HollyFrontier. *Lujan*, 504 U.S. at 566 (“Standing is not ‘an ingenious academic exercise in the conceivable,’ but ... requires ... a factual showing of perceptible harm.”).

² PRUITT obliquely refers to this declaration. Pet. Br. 18 n.24. Far from using this declaration to show how at least one of PRUITT’s members has suffered cognizable harm as a result of EPA’s decisions, the declaration merely repeats arguments PRUITT has made elsewhere. This lack of specific detail deprives the declaration of any value for determining standing.

Actual data about renewable fuel production belies PRUITT's arguments about demand for renewable fuels dropping. Contrary to PRUITT's claims that the exemptions are diminishing the market for renewable fuels, ethanol and biodiesel sales have increased even when EPA has granted more exemptions than in previous years. Indeed, biomass-based diesel production *increased* in 2018 from 2017, exceeding the statutory mandate. *See* U.S. Energy Info. Admin., Monthly Biodiesel Production Report, Table 1 (showing monthly production volumes for 2016, 2017, and 2018), <https://www.eia.gov/biofuels/biodiesel/production/biodiesel.pdf>. Notably, over the last few years, the actual regulatory compliance obligations under the RFS were achieved. *See* Annual Compliance Data for Obligated Parties and Renewable Fuel Exporters under the Renewable Fuel Standard (RFS) Program, *available at* <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/annual-compliance-data-obligated-parties-and>. For example, in the 2017 compliance year EPA calculated the actual volume obligation to be 18.9 billion RINs,³ renewable fuel producers generated 19.4 billion RINs,⁴ and 19.3 billion RINs were separated.⁵ That means more than 400 million RINs'

³ *See* EPA, Annual Compliance Data, <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/annual-compliance-data-obligated-parties-and>.

⁴ *See* EPA, RINs Generated Transactions, <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rins-generated-transactions>

⁵ *See* EPA, RIN Use, <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rin-use>

worth of renewable fuel was produced (RINs generated) and blended or consumed (RINs separated) than necessary to fulfill the mandatory renewable volume obligation.

PRUITT also fails to consider alternative economic forces as a cause of their alleged injury. Supply and demand for transportation fuels, renewable fuel, and RINs can be influenced by a host of factors, such as trade policies, consumer demand, and overall renewable fuel production. *See, e.g.,* James H. Stock, *The Renewable Fuel Standard: A Path Forward*, Center for Global Energy Policy 16 (Apr. 2015), EPA-HQ-OAR-2015-0111-2603-Ex. B (JA__-__). For example, in 2016 and 2017, fuel consumption fell short of the EIA predictions used to set the standards for those years—approximately 4.6 and 10.2 billion gallons, respectively, which would decrease the renewable fuel volume required to comply with the annual obligation.⁶ PRUITT simply assumes without proof “[REDACTED]” in 2018 were attributable to EPA’s RIN replacements, and no other cause. Doc. Nos. 1759744 (public) & 1759893 (sealed), DeAngelis Decl. ¶ 16; Pet. Br. Addendum, Cain Decl. ¶¶ 23, 26.

⁶ *See* Table 1: Estimated versus Actual Gasoline and Diesel Volume Produced for Domestic Use (<https://www.epa.gov/fuels-registration-reporting-and-compliance-help/annual-compliance-data-obligated-parties-and>).

In light of this data, PRUITT unsurprisingly does not establish with hard evidence that the drop in demand and prices for renewable fuel in 2018 is linked to EPA's actions. *See Sierra Club*, 292 F.3d at 898-99.

Second, PRUITT similarly fails to establish standing based on the possible further effect of any action. PRUITT's standing rests on sweeping statements like: "EPA's complete lack of transparency, [which] make[s] it impossible for biofuel producers to predict the actual ... demand they will face going forward...." Pet. Br. Addendum, Cain Decl. ¶ 32. This "theory of *future* injury is too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending'" or that it is "fairly traceable" to EPA's decisions. *Clapper*, 568 U.S. at 401-02; *see also Summers v. Earth Island Inst.*, 555 U.S. 488 (2009). PRUITT has offered nothing beyond mere speculation to suggest that EPA will continue to grant so-called retroactive exemptions or allow refineries to replace prior-year RINs.

In the end, PRUITT cannot claim entitlement to more renewable fuel sales or demand for RINs than required by statute or regulation. There are billions of excess RINs on the market that HollyFrontier or Sinclair could have used to satisfy their annual volume obligations had EPA not granted the remedy it did. PRUITT has not shown that EPA's actions deprived it or any member of value they would have received or that these actions will certainly do so in the future.

B. PRUITT's Petition Failed to Identify Final Agency Actions Related to Its Key Claims.

EPA has assumed that PRUITT's Petition adequately identified final agency actions, but the Petition itself does not identify the final agency action it seeks to challenge. Accordingly, this Court lacks subject-matter jurisdiction. *See Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004). PRUITT merely challenges, among other things, EPA's "decision to allow the generation of [RINs] by obligated parties" under the RFS Program "that do not represent biofuel production the year the RIN was generated." Pet. for Review, Doc. No. 1743716, at 1. This is nothing more than a challenge to a general EPA policy underlying the exemption decision, as opposed to a challenge to a final action. *See Indep. Equip. Dealers Ass'n*, 372 F.3d at 428.

"The federal courts are not authorized to review agency policy choices in the abstract." *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 (D.C. Cir. 2006). Rather, "before there may be judicial review there must be a 'discrete' 'agency action.'" *Id.* at 21 (citation omitted). PRUITT's Petition fails to identify those discrete agency actions. Indeed, it names neither Sinclair nor HollyFrontier as beneficiaries of EPA's decision to replace RINs, and otherwise fails to "specify the order" to be reviewed. Fed. R. App. P. 15(a)(2)(C).

In PRUITT's defense against EPA's Motion to Dismiss, it suggests there is no jurisdictional problem if the Court can "fairly infer" the actions for which it

seeks review. Doc. No. 1765326, at 2. The case it cites for this proposition, *LaRouche's Comm. for a New Bretton Woods v. FCC*, 439 F.3d 733, 739 (D.C. Cir. 2006), recognized that “contemporaneous filings,” such as motions or statements of issues, *may* cure an otherwise defective petitions. But here, no such contemporaneously filed material could perform that curative role. *See Am. Rivers v. FERC*, 895 F.3d 32, 44 (D.C. Cir. 2018) (inferring “intent to seek review” where a motion, docketing statement, statement of issues, and underlying decisions were “attached to the appeal”). PRUITT did not file its Docketing Statement or Statement of Issues until November 13, 2018, nearly three-and-a-half months after it filed its Petition. That is not a contemporaneous filing. *See Entravision Holdings, LLC v. FCC*, 202 F.3d 311, 314 (D.C. Cir. 2000) (describing as “nearly contemporaneous” documents filed within a month of the petition for review).

PRUITT should not be allowed to go on a fishing expedition, filing a deficient Petition and permitting the course of litigation to cure any deficiencies.

C. PRUITT's Challenge Is Untimely.

Even if PRUITT could establish standing or an adequate petition for review, the Court nevertheless lacks jurisdiction over PRUITT's challenge to prior rulemakings because its Petition was untimely. A party challenging EPA action must do so within sixty days. 42 U.S.C. § 7607(b)(1); *Harrison v. PPG Indus.*, 446 U.S. 578, 587 (1980). The four rulemakings PRUITT challenges were

published in 2010, 2015, 2016, and 2017, making PRUITT's Petition untimely. 42 U.S.C. § 7607(b)(1).⁷

PRUITT cannot premise jurisdiction on the basis of a petition that is “based solely on grounds arising after” the 60-day period for seeking judicial review. *Id.* To establish valid grounds arising after, courts look for “subsequent factual or legal development” that has created “new legal consequences for petitioner.” *Sierra Club v. EPA*, 815 F.3d 22, 27-28 (D.C. Cir. 2016). PRUITT raises concerns about the number of exemptions, an increase in RINs, the granting of retroactive exemptions, and similar issues. Pet. Br. 38-41. But these are not grounds arising after because the regulated community had notice of EPA's interpretation of its authority regarding small refinery exemptions *and* the biofuels community provided comment on the claims it now makes, very belatedly, in this Court. The issues that PRUITT raises here do not create any “new legal consequences” for PRUITT that did not exist years ago. *Id.* In effect, PRUITT's challenge amounts

⁷ PRUITT's challenge to HollyFrontier's exemption decision is also untimely. The decision was signed on January 24, 2018. *See* Proposed Respondent-Intervenors' Resp. in Opp. to Pet. Motion for Stay, Doc. No. 1762811 (public), 1762976 (sealed), Ex. A, Taylor Decl. ¶ 6. The Clean Air Act has no discovery rule, but even if it did, HollyFrontier publicly disclosed that EPA replaced the refinery's RINs. *Id.* It did so in a Form 10-Q report on May 2, 2018, which was ninety days before PRUITT filed its petition. PRUITT's challenge to this decision cannot be timely under 42 U.S.C. § 7607(b)(1).

to a complaint about the “*application* of the Rule not the Rule itself.” *See Nat’l Biodiesel Bd. v. EPA*, 843 F.3d 1010, 1017 (D.C. Cir. 2016).

EPA first explained in 2010 that it

may extend the exemption for individual small refineries on a case-by-case basis if they demonstrate disproportionate economic hardship. If any small refinery exemptions for 2011 are approved after this final rulemaking, the parties in question would be exempt but we would not intend to modify the applicable percentage standards and announce new standards for 2011. EPA believes the Act is best interpreted to require issuance of a single annual standard in November that is applicable in the following calendar year, thereby providing advance notice and certainty to obligated parties regarding their regulatory requirements. Periodic revisions to the standards to reflect waivers issued to small refineries or refiners would be inconsistent with the statutory text, and would introduce an undesirable level of uncertainty for obligated parties.

75 Fed. Reg. 76,790, 76,804 (Dec. 9, 2010) (emphasis added) (JA___). PRUITT claims EPA “[m]erely referenc[ed] the possibility that EPA may grant exemptions after the standards are set.” Pet. Br. 25. But the only “possibility” was that no small refineries would be granted exemptions. EPA’s position that it can—and would where disproportionate economic hardship exists—grant exemptions “at any time” was clear. This statement also provided ample notice that EPA would not account for exempted small refineries’ RIN requirements by revising the annual renewable fuel volumes or percentage standards.

EPA reiterated this interpretation in its 2012 proposed rule, and it further explained that a few refineries that satisfactorily demonstrated disproportionate economic hardship prior to EPA issuing the proposed rule and that the

gasoline and diesel volumes of those refineries have been appropriately accounted for in the development of the proposed standards. If additional individual refinery requests for exemptions are approved following the release of this NPRM, the final standards will be adjusted to account for those exempted volumes of gasoline and diesel. However, any requests for exemptions that are approved after the release of the final 2012 RFS standards will not affect the 2012 standards.... Thus, after the 2012 standards are finalized, any additional exemptions issued will not affect those standards.

76 Fed. Reg. 38,844, 38,859 (July 1, 2011) (JA__); *accord* 82 Fed. Reg. 58,486, 58,523 (Dec. 12, 2017) (“EPA is *maintaining its approach* that any exemptions for 2018 that are granted after the final rule is released will not be reflected in the percentage standards that apply to all gasoline and diesel produced or imported in 2018.” (emphasis added)) (JA__).

Not only was EPA’s position clear, biofuels producers commented on these issues. They asked EPA to set a deadline for small refineries to seek exemptions; to provide an opportunity for public comment on exemption requests prior to finalizing the annual rule; and to see that volumes from exempt refineries are “made up” later. Comments of Renewable Fuels Association at 6-8 (Aug. 11, 2011), EPA-HQ-OAR-2010-0133-0163 (JA__ - __); Comments of National Biodiesel Board at 8-10 (Aug. 11, 2011), EPA-HQ-OAR-2010-0133-0159 (JA__ - __). EPA maintained this approach in the final rule for 2012. 77 Fed. Reg. 1,320, 1,340 (Jan. 9, 2012) (JA__). Biofuels producers also raised concerns that EPA treated small refinery exemptions as impermissible waivers of the statutory

volumes; that the statute does not allow EPA to grant small refinery exemptions to refineries that have not been continuously exempt; that EPA cannot grant exemptions mid-year (*i.e.*, after the compliance deadline); and that EPA should grant small refinery exemptions prospectively only. Nat'l Biodiesel Bd.

Comments at 9-10 (JA__ - __). Despite these concerns, no biofuels producer sought judicial review of the final 2012 rule. PRUITT cannot now complain that “the biofuels industry could not have been aware” of EPA’s interpretation of the statute, Pet. Br. 43, and it is not enough for PRUITT to have failed to anticipate the “scope and impact” of EPA’s approach to small refinery exemptions. *Id.* at 38.

Contrary to PRUITT’s contentions, Pet. Br. 37-41, EPA is not altering its regulations by allowing “retroactive exemptions.” Reading the statute “as a whole,” Pet. Br. 28, does not change the fact that the statute specifically allows EPA to grant hardship petitions “at any time.” 42 U.S.C. § 7545(o)(9)(B)(i). On its face, the phrase “at any time” has no ambiguity, and, in this context, is not limited to prospective decisions. In fact, the statute uses the same phrase two other times, each of which has a specific time period attached to it. *Id.*

§ 7545(o)(1)(I)(i)-(ii). If Congress had also wanted to limit the time for hardship petitions in the same way, it could have. But “Congress’ choice of words is presumed to be deliberate.” *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013). Even if “at any time” were unclear, EPA’s interpretation that the

phrase authorizes it to grant small refinery exemptions after the annual rule is finalized or after the compliance deadline is reasonable. Congress established disproportionate economic hardship exemptions to protect small refineries. It clearly intended for those refineries to seek relief “at any time.” Interpreting the statute to preclude EPA from providing relief in response to exemption petitions filed “at any time” does violence to the plain language of the statute. And if PRUITT or its members desired to challenge EPA’s incorporation of the same phrase in its regulations, 40 C.F.R. § 80.1441, they could have. EPA’s discretion to act under these provisions has not changed since they were enacted, so EPA’s actions under them do not constitute a legal change.

The agency action here did not amount to a reinterpretation of the RFS or its administration. EPA need not promulgate rules to cover every conceivable issue. *Shays*, 528 F.3d at 930. And here, EPA merely resolved individual hardship petitions for particular small refineries and, appropriately for an informal adjudication provided a specific remedy limited to discrete parties. *See id.*

PRUITT’s Petition is untimely, and the Court therefore lacks jurisdiction.⁸

⁸ Neither does this Court have jurisdiction under the reopener doctrine. PRUITT argues that EPA has “significantly altered the stakes of judicial review” by expanding the small refinery exemption program. Pet. Br. 44 (quoting *Sierra Club v. EPA*, 551 F.3d 1019, 1025-26 (D.C. Cir. 2008)). EPA’s actions on remand from the Tenth Circuit were narrowly tailored to provide appropriate relief to Intervenors, and PRUITT’s complaints that the impact of EPA’s implementation of its longstanding interpretation of the statute is greater than the biofuels industry

D. PRUITT Has Failed to Satisfy the Procedural Requirements for Bringing a Case Based on “Grounds Arising After.”

Even if PRUITT could get past these fatal jurisdictional defects, the administrative reconsideration petition it filed with EPA precludes this Court’s review. On the same day PRUITT filed its Petition in this Court, PRUITT separately petitioned EPA under 42 U.S.C. § 7607(d)(7)(B) to reconsider the same agency actions it challenges here. *See* EPA Opp. to Pet’rs Motion to Supplement Record, Doc. No. 1772829, Ex. A, Petition for Reconsideration. That petition remains pending. Consequently, the existence of this parallel procedure precludes this Court’s review of the same substantive matters until the agency has ruled on the petition. *See Utility Air Regulatory Grp. v. EPA*, 744 F.3d 741, 746 (D.C. Cir. 2014).

PRUITT argues that this Court should nonetheless proceed to the merits of the case without affording EPA an opportunity to respond to the reconsideration petition, Pet. Br. 47-49, but PRUITT’s arguments are meritless. Under the very provision that PRUITT invoked, “a party may not raise for judicial review objections to a rule that it raised *for the first time* in a petition for agency reconsideration—at least until that petition is resolved.” *Utility Air Regulatory*

anticipated are not sufficient to reopen EPA’s rulemakings. *Nat’l Biodiesel Bd.*, 843 F.3d at 1017 (no grounds arising after exist where “the basic regulatory scheme remains unchanged”) (internal quotations omitted).

Grp., 744 F.3d at 746 (applying 42 U.S.C. § 7607(b)(1)). A petitioner may seek judicial review only if “an objection to a rule or procedure ... was raised with reasonable specificity during the period for public comment.” 42 U.S.C. § 7607(d)(7)(B).

Here, PRUITT contends that EPA’s actions are “new grounds” supporting judicial review. Pet. Br. 48. But it does not identify any “objection ... raised with reasonable specificity” that would remove it from § 7607(d)(7)(B)’s bar. Indeed, in its brief, PRUITT acknowledges that EPA’s policy was not to readjust the volume targets to account for exemptions granted after the annual volume obligation is set. Pet. Br. 37-38. PRUITT’s protest that it could not have foreseen the scope of exemptions EPA might grant falls short. As discussed above, *supra* I.C.2, the renewable fuels industry did submit comments on EPA’s policy. If the industry was concerned about the number of exemptions EPA might grant after setting the volume obligation, it should have challenged EPA’s determination. Because it did not do so, PRUITT may not excuse § 7607(d)(7)(B)’s requirement here. EPA must resolve the petition for reconsideration before the Court may entertain PRUITT’s petition for review.

In any event, allowing EPA to complete its reconsideration before this Court reviews PRUITT’s challenge would allow the Court to have “a record to evaluate complex regulatory issues.” *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 962

(D.C. Cir. 2007). This Court’s review “is likely to stand on much surer footing” if it comes after the agency has had the opportunity to apply the relevant standards to the particular facts. *Toilet Goods Ass’n v. Gardner*, 387 U.S. 158, 163-64 (1967); *see also, e.g., Etelson v. OPM*, 684 F.2d 918, 928 (D.C. Cir. 1982) (remanding for the agency to “apply[] its expertise and discretion” to a question not answered by the extant record). Allowing EPA to respond to PRUITT’s arguments in the regulatory context is particularly appropriate here, where PRUITT has asked the Court to declare that EPA has made wholesale changes to its administration of the RFS through an informal adjudication. *See Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 666 (D.C. Cir. 1975). Contrary to PRUITT’s arguments, EPA’s letters to Senator Grassley and Representative Loesback do not satisfy the purposes of seeking reconsideration. Pet. Br. 47-48; Pet. Opp. to Motion to Dismiss, Doc. No. 1765326, Exs. C, E (JA __, __). EPA’s discussion of exemption decisions in a public letter is not the same as allowing it to provide a reasoned response to a petitioner’s arguments, particularly where, as here, the decision intrinsically relies on confidential business information.

At a minimum, this Court should hold the petition for review until EPA fully considers PRUITT's arguments and produces a complete record to assist this Court in its consideration.⁹

E. PRUITT's Challenge Is in the Wrong Court.

Even if PRUITT's Petition were construed to challenge the individual adjudications involving Sinclair and HollyFrontier, this Court lacks jurisdiction over that element of PRUITT's case. A challenge to EPA's decisions on remand from the Tenth Circuit belongs in that Court, not this one. Challenges to a "locally or regionally applicable" final action "may be filed only in the United States Court of Appeals for the appropriate circuit." 42 U.S.C. § 7607(b)(1). Venue in this Court is proper only if EPA's action is "nationally applicable." *Id.* "To determine whether a final action is nationally applicable, 'this Court need look only to the face of the rulemaking, rather than to its practical effects.'" *Dalton Trucking, Inc. v. EPA*, 808 F.3d 875, 881 (D.C. Cir. 2015) (quoting *Am. Rd. & Transp. Builders Ass'n v. EPA*, 705 F.3d 453, 456 (D.C. Cir. 2013)).

EPA's RIN-replacement decisions were part of the actions the agency took to address the court's remand from *Sinclair*, where the Tenth Circuit held that EPA had wrongfully denied the hardship exemptions. 887 F.3d at 999. By the Tenth

⁹ Given the numerous jurisdictional defects in PRUITT's case, the Court should not entertain a request to transfer any portion of this case, or hold it in abeyance pending another case.

Circuit’s characterization, these decisions were inherently local. The court explicitly noted that small refinery decisions were “specific to the parties at issue” and “were resolved on the basis of [the refineries’] submissions.” *Id.* at 992. The decisions were not broad-based policies implemented “by the head of the EPA,” but were made “instead by a mid-level Agency official.” *Id.* Nor do they hold any “precedential value for third parties,” or “[i]ndeed ... even for the refiner, since *each* petition must be resolved on a *case-by-case basis*.” *Id.* (emphasis added). Moreover, third parties cannot even access the decisions, “since the EPA does not publicly release its decisions because they contain confidential business information.” *Id.*

Though EPA’s decisions on remand reached a different conclusion than before, such an outcome does not change their inherently local applicability. Each decision was a discrete action that applied to a single refinery. And all of the affected small refineries are in Wyoming; none are in Washington, D.C. or serve the D.C. area. *See* Doc. Nos. 1762681 (public) & 1762885 (sealed), Attach. A-E (JA__ - __). The face of each underlying decision includes EPA’s rationale, which underscores the individual, local nature of EPA’s decisions. EPA explained that it needed to account for a lengthy administrative proceeding that—through no fault of the refineries—caused the refineries to retire RINs in 2015 to satisfy obligations that should have been exempted. *Id.* Thus, looking at the “face of the” agency

actions reveals that these actions were no more than the crafting of locally applicable remedies. *Dalton Trucking*, 808 F.3d at 881.

PRUITT argues that EPA's decision to allow HollyFrontier and Sinclair to replace RINs amended the national regulations and was felt nationally. Pet. Opp. to Motion to Dismiss, Doc. No. 1764330, at 4; Pet. Br. 32-35. This is incorrect. Nothing in EPA's decision amended the existing regulations. Moreover, the regulations' text is the same today as it was before EPA's decisions, and PRUITT has not demonstrated that EPA has applied the same relief outside these isolated decisions. PRUITT also fails to acknowledge that for this Court to have jurisdiction over the local issues in this matter, the Administrator of EPA must "find[] and publish[]" that final action has "nationwide scope and effect." 42 U.S.C. § 7607(b)(1). EPA made no such statement. The consequence of PRUITT's argument would render the venue provisions of the Clean Air Act a nullity. By PRUITT's logic, any regional decisions could be challenged in this Court because they would all stem from national regulations. That is inconsistent with the Clean Air Act and this Court's decisions.

II. Even if the Court Has Jurisdiction, EPA Has Properly Administered the RFS Program and Reasonably Provided a Remedy to Intervenors.

A. Standard of Review

The Court may not reverse EPA action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2);

see also 42 U.S.C. § 7607(d)(9)(A). “[T]he breadth of agency discretion” is at its “zenith” when it comes to the agency’s “fashioning of policies, remedies and sanctions.” *Niagara Mohawk Power Corp.*, 379 F.2d at 159.

B. EPA Has Discretion When It Implements Remedies.

PRUITT does not challenge the merits of EPA’s hardship exemption decisions for Sinclair or HollyFrontier but instead asks the Court to review solely the propriety of EPA’s choice of remedy. As EPA demonstrates, the remedy is well within its authority and is a proper exercise of that authority.

Congress granted EPA broad discretion to manage the RFS program. PRUITT contends that EPA’s discretion is limited to benefitting biofuel producers because that was Congress’s sole purpose for enacting the RFS. *E.g.*, Pet. Br. 24. But Congress’s charge was not so narrow. Congress wanted to “clos[e] the supply and demand imbalance ... to ensure the country’s continued growth and prosperity and to protect our national security.”¹⁰ As this Court recognized, EPA plays an important role in balancing the consumption of renewable fuel with the burdens on obligated parties to comply with the mandates. *See Ams. for Clean Energy v. EPA*, 864 F.3d 691, 715 (D.C. Cir. 2017) (“EPA’s interpretation also reasonably balances the need to drive growth in the renewable fuel industry with the need to

¹⁰ Committee on Energy and Natural Resources Report for the Energy Policy Act of 2005, S. Rep. No. 109-78 at 6 (June 9, 2005) (JA__).

ensure that obligated parties have sufficient flexibility to comply with the statute.”). For this reason, it is EPA’s longstanding interpretation (which was not challenged in 2012) that it need not “ensure” that the volumes are precisely met. 77 Fed. Reg. at 1,340 (EPA is “not required to ensure that the biofuel volumes in the statute are precisely met....”) (JA__).

The multiple purposes of the RFS are evident from the provisions Congress enacted to protect the domestic fuel industry, including a specific set of provisions to protect small refineries from onerous regulatory burdens.¹¹ *See, e.g., Sinclair*, 887 F.3d at 989 (“Congress was aware the RFS Program might disproportionately impact small refineries ... and therefore created three classes of exemptions to protect these small refineries.”).

As noted above, Congress authorized exemptions for small refineries that would suffer “disproportionate economic hardship” as a result of compliance with the RFS. 42 U.S.C. § 7545(o)(9). Congress did not define what constitutes such a hardship, and thus left to EPA the discretion to consider various factors, ranging from the Department of Energy’s report on the program’s burden on small refineries to “other economic factors” affecting a particular small refinery. *See id.*;

¹¹ Although EPA must “ensure” that the annual volume requirements are met, 42 U.S.C. § 7545(o)(2)(A)(i), it need not “pursue[] its purposes’ of increased renewable fuel generation ‘at all costs.’” *Ams. for Clean Energy*, 864 F.3d at 714 (quoting *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) (alteration in original)).

see also Hermes Consol., 787 F.3d at 577 (“‘In the absence of any express or implied statutory directive to consider particular factors,’ EPA retains broad discretion to choose which ‘economic factors’ it will (and will not) consider.”) (quoting *Monroe Energy, LLC v. EPA*, 750 F.3d 909, 915 (D.C. Cir. 2014)).

In adjudicating small refinery petitions, EPA can act without going through notice-and-comment rulemaking. PRUITT contends otherwise, but Congress clearly did not require that *all* EPA action in carrying out the RFS Program be by regulation. Where such requirements are necessary, Congress explicitly identifies them. For example, when EPA considers exercising its general waiver authority, it can act “after public notice and opportunity for comment.” 42 U.S.C.

§ 7545(o)(7)(A)(i). This requirement is noticeably absent from the small refinery exemption provision. *See id.* § 7545(o)(9)(B). This distinction is significant, evincing greater discretion for exemptions. *See Nat’l Biodiesel Bd.*, 843 F.3d at 1017 (holding that EPA reasonably conducted an informal adjudication where regulation did not require notice and comment). Furthermore, hardship exemption petitions are not listed among the rules that are subject to the Clean Air Act’s detailed notice-and-comment and other rulemaking procedures. *See* 42 U.S.C. § 7607(d)(1) (listing the rules subject to those procedures).

In the absence of a specific statutory requirement to adjudicate relief for small refinery exemptions, EPA “may perform th[is] administrative function[.]” of

managing small-refinery exemptions “both through rulemaking and adjudication.”

See Neustar, Inc. v. FCC, 857 F.3d 886, 893 (D.C. Cir. 2017). EPA need not promulgate rules for every eventuality. *See Shays*, 528 F.3d at 930; *see also Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 96 (1995) (“The [Administrative Procedure Act] does not require that all the specific applications of a rule evolve by further, more precise rules rather than by adjudication.”). Agencies have discretion to use the informal adjudicatory process as a matter of regulatory flexibility. *See POM Wonderful, LLC v. FTC*, 777 F.3d 478, 497 (D.C. Cir. 2015) (“[T]he choice between rulemaking and adjudication lies in the first instance within the agency’s discretion.”).¹² This discretion is “very broad.” *Nat’l Biodiesel Bd.*, 843 F.3d at 1017 (quoting *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007)). In fact, this Court recognized that “[a]gency discretion ... is ... at [its] zenith’ when the agency fashions remedies to effectuate the charge entrusted to it by Congress.” *Malta Irr. Dist. v. FERC*, 955 F.2d 59, 65 (D.C. Cir. 1992) (quoting *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 109 (D.C. Cir. 1984)).

¹² EPA’s discretion extends to “many of the specialized problems which arise” when administering a complex statute. *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947). The Supreme Court has recognized that while “filling in the interstices” of a statute is preferably achieved through rulemaking, “any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing” with every issue that can arise. *Id.*

Here, EPA exercised this discretion and resolved the “highly fact-specific” issue before it with an informal adjudication, as it was permitted to do. *Neustar, Inc.*, 857 F.3d at 893. It faced a novel question: how to further the statute’s purpose with regard to particular small refineries entitled to exemptions where the course of regulatory and litigation proceedings would render the most obvious remedies worthless. The relief provided in this situation was perfectly reasonable. By issuing current replacement RINs, EPA put the refineries in as close to a situation as they would have been in had EPA granted the exemptions when the refineries could have used the RINs they unnecessarily retired. EPA’s choice to make these decisions through informal adjudication, rather than by public notice-and-comment, was particularly appropriate because the exemption decision and remedy involved sensitive and confidential business information, which EPA was required to protect by law. Such action is similar to that courts deemed reasonable and proper. *See Shays*, 528 F.3d at 930; *POM Wonderful*, 777 F.3d at 497.

C. The Exemption Decisions Were Consistent with the Law and Neither Arbitrary Nor Capricious.

EPA’s remedial decision here was a proper exercise of discretion to replace the limited number of RINs Sinclair and HollyFrontier unnecessarily retired, in light of the delay in the agency’s process, up through and including *Sinclair*. In other RFS cases, this Court has recognized EPA’s “duty to consider and mitigate

any hardships caused to obligated parties by reason of [regulatory] lateness.” *Ams. for Clean Energy*, 864 F.3d at 718.

EPA determined that Sinclair and HollyFrontier were entitled to hardship exemptions but it could not simply refund the previously retired RINs, as it has done in the past. Those RINs would have been valid until 2017 at the latest. 40 C.F.R. § 80.1427(a)(6). That would be like an airline compensating a bumped flyer with a voucher only good for travel in the past. EPA recognized that the retired RINs “[REDACTED]” in the time that it took the refineries to challenge EPA’s denial of their timely exemption petitions. *E.g.*, Doc. Nos. 1762681 (public) & 1762885 (sealed), Decl., Attach. E, at 4 (JA__). “[REDACTED]” by this situation, EPA elected to use its “[REDACTED]” “[REDACTED]” to make the small refineries whole under the RFS. *Id.* In doing so, it relied specifically on this Court’s recognition that agencies may “[REDACTED]” *Id.* (JA__) (quoting *Shays*, 528 F.3d at 930).

Moreover, the decisions demonstrated EPA’s efforts to tailor the remedy to the existing statutory and regulatory scheme. It authorized Sinclair and HollyFrontier to replace on a one-for-one basis the retired RINs with 2018 RINs. In doing so, EPA ensured that each RIN related to a gallon of renewable fuel that was blended into transportation fuel. The new 2018 RINs were linked directly to

the 2014-2015 RINs to ensure, for example, that any RINs deemed improper from that time period would also be improper now. Tracking of the linked-together RINs would take place in EPA's Moderated Transaction System. And, although a retired RIN "cannot be used to demonstrate compliance in any other year," EPA's decision meant that the 2014-2015 RINs that Sinclair and HollyFrontier had submitted had, in effect, no longer been "used to demonstrate compliance" in those years. 40 C.F.R. § 80.1427.

PRUITT argues that the agency violated the statutory and regulatory structure. Pet. Br. 25-32. Those arguments are unavailing. Citing various RFS provisions, PRUITT asserts that the replacement RINs resulted in the improper creation of "invalid" RINs. But PRUITT ignores the fact that the RFS Program does not contemplate the scenario here, in which litigation and regulatory process delayed the hardship determination until after the RINs had lost their value. EPA's discretion allowed it to resolve such an interstitial issue, and no regulation prohibited it from replacing RINs in these circumstances.¹³ The replacement RINs are tied explicitly to renewable fuel that has been produced and meet all attributes required under the statute and EPA's regulation. *See* 42 U.S.C. § 7545(o)(1). In

¹³ PRUITT suggests that "the record lacks any relevant information" about the original RINs that EPA replaced. Pet. Br. 26. But as EPA described in the Sinclair and HollyFrontier decisions, each replacement RIN tracks the refineries' initial RINs.

particular, it was EPA that replaced the RINs; the refineries did not “generate” new RINs independently, as PRUITT implies.¹⁴ *See, e.g.*, Doc. Nos. 1762681 (public) & 1762885 (sealed), Decl., Attach. E, at 4 (JA__); Pet. Br. 26-27.

PRUITT’s challenge to EPA’s prior rulemakings also fails. PRUITT argues that the statute and regulations solely contemplate prospective relief, and that “[i]t makes little sense” to allow a refinery to wait until late in the compliance year, and perhaps even procure sufficient RINs, before seeking its exemption. Pet. Br. 49-50. But this argument relies on the assumption that no small refinery faces a disproportionate economic hardship unless it faces a threat to its viability. The Tenth Circuit rejected that assumption. *See Sinclair*, 887 F.3d at 996-97.¹⁵ And, as discussed above, EPA has reasonably and consistently determined that it should not alter the annual volume obligations even if exemptions are granted after the obligation is set. *See supra* II.C.2. EPA’s regulations thus reasonably permit small

¹⁴ PRUITT latches onto EPA’s use of the word “generate” in the decisions. But EPA used the word “generate” in a different sense than the applicable regulations do. *E.g.*, Decl., Attach. E, at 4 (JA__). EPA used the word “generate” to describe the process of how the agency would account for the RINs in EPA’s Moderated Transaction System. The RINs themselves were still generated in accordance with all the statutory and regulatory guidelines.

¹⁵ Similarly, Petitioner complains that it “is difficult to see how a small refinery that *could, and even, did* comply would be entitled to a *hardship* exemption.” Pet. Br. 24. This argument also fails. Congress authorized EPA to grant small refineries exemptions when they demonstrate “disproportionate economic hardship.” 42 U.S.C. § 7545(o)(9). Inability to comply with the RFS is simply not the test.

refineries to seek exemptions “at any time,” and PRUITT seeks to impose a crabbed reading that is inconsistent with the statute and regulations. Contrary to PRUITT’s characterizations, EPA did not engage in a wholesale modification of any existing policies. Instead, it used its discretion to craft a limited remedy that accounted for its power under the RFS to protect small refineries from undue economic hardship.

At bottom, EPA’s act of discretion ensured that Sinclair and HollyFrontier were not harmed as a result of delay in the administrative process. EPA acted through an informal adjudication to craft individual decisions that took stock of the RFS and ensured that the agency protected certain small refineries. A central purpose of the statute would be undermined by a finding that a small refinery rightly deserved an exemption but lost the benefit of that exemption while pursuing an administrative appeal.

CONCLUSION

For the foregoing reasons, and those in EPA's brief, the Court should dismiss the Petition for review, or in the alternative deny it.

Dated: March 11, 2019

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of D.C. Circuit Rule 32(e), because it contains 9,053 words (as determined by the Microsoft Word 2016 word-processing system used to prepare the brief), excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1).

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I hereby certify that on March 11, 2019, I electronically filed the foregoing using the Court's CM/ECF system, which will send notifications to all counsel registered to receive electronic notices.

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ORAL ARGUMENT SCHEDULED FOR MAY 7, 2019
CASE NO. 18-1202

IN THE
**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PRODUCERS OF RENEWABLES UNITED FOR
INTEGRITY TRUTH AND TRANSPARENCY,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON PETITION FOR REVIEW FROM THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

FINAL REPLY BRIEF OF PETITIONER

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

EPA	U.S. Environmental Protection Agency
Petitioner	Producers of Renewables United for Integrity Truth and Transparency
Respondent-Intervenors	HollyFrontier Refining & Marketing LLC, HollyFrontier Cheyenne Refining LLC, Sinclair Wyoming Refining Company, and Sinclair Casper Refining Company
RFS	Renewable Fuel Standard
RIN	Renewable Identification Number

SUMMARY OF ARGUMENT

The Renewable Fuel Standard (RFS) represents Congress’s carefully crafted incentives to “increase the *production* of clean renewable fuels.” Resp’t’s Br. at 3 [Doc. #1775897] (“EPA Br.”) (emphasis added); 42 U.S.C. §7545(o)(2)(A), (o)(3); S. Rep. No. 110-65 at 2 (2007). EPA established the Renewable Identification Number, or RIN, to implement these incentives, and RIN availability is key to ensuring they are meaningful. *See, e.g., Monroe Energy, LLC v. EPA*, 750 F.3d 909, 919 (D.C. Cir. 2014). Retiring RINs (and keeping them retired) promotes *production* by defining the remaining *national* demand for biofuel *gallons*.

In July 2018, it became apparent that EPA has undermined these carefully crafted incentives through closed-door adjudications of small refinery exemptions and “unretiring” RINs, including reviving expired RINs. While portraying this case as only involving “unique” remedies for three Wyoming facilities, EPA and Respondent-Intervenors bely that portrayal by citing more broadly to EPA’s “practices” (for refineries across the country) to support EPA’s actions, ignoring statutory and regulatory provisions limiting EPA’s authority. Despite claiming these “practices” *must* be kept confidential, they also blame Petitioner for not previously divining the predicaments EPA has created.¹ Their arguments are meritless.

¹ That exemption requests may contain confidential information, EPA Br. at 23, does not justify secret *decisions*, especially where EPA has found exemption decisions are not confidential. 81 Fed. Reg. 80,828, 80,909-80,910 (Nov. 16, 2016).

ARGUMENT

I. PETITIONER HAS STANDING.

Petitioner’s members’ standing is “self-evident.” *Nat’l Biodiesel Bd. v. EPA*, 843 F.3d 1010, 1015 (D.C. Cir. 2016); *cf.* Br. of Intervenors-Respondents at 13-17 [Doc. #1777051 (public), #1777255 (sealed)] (“Resp’t-Intervenors Br.”). Biofuel producers—the RFS’s intended beneficiaries—have routinely challenged (and defended) EPA’s implementation of the RFS to ensure its integrity and increased biofuel demand.

In a RIN-market system, “Economics 101” supports finding standing here. *See Fla. Audubon Soc’y v. Bentsen*, 94 F.3d 658, 683 (D.C. Cir. 1996) (Courts may assume “defendant’s actions will have the effect that economics would foretell.”). EPA’s actions have thrown *hundreds of millions* of RINs back into the RIN market.² Economists agree that this affects RIN availability and demand for production and causes RIN-price volatility.³ Petitioner is *not* required to exclude all other potential market factors. *See Monroe Energy*, 750 F.3d at 915 (finding irrelevant third-parties’ effect on RIN prices in assessing obligated party’s standing); *see also Attias v. CareFirst, Inc.*, 865 F.3d 620, 629 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 981 (2018) (“Article III standing does not require that the defendant be the most

² EPA Opp’n to Stay Mot., Decl. ¶¶19-20 (JA955).

³ Opening Br. of Pet’r at 15 [Doc. #1773103] (“Pet’r Br.”).

immediate cause, or even a proximate cause, of the plaintiffs' injuries.") (citation omitted).

Whether some producers may have increased production says nothing about the harms here—*e.g.*, lost RIN value, reduced profits, foregone sales, and stranded investments.⁴ While Congress sought higher volumes than EPA required, 42 U.S.C. §7545(o)(2)(B), Respondent-Intervenors (at 15) misstate that the 2017 RFS was met, because not all volumes go toward the mandates (*e.g.*, exported volumes that show *reduced U.S.* demand). In 2017, EPA required a *minimum* volume of 19.28 billion gallons, but the actual reported volume obligations totaled only 18.175 billion gallons due to small refinery exemptions.⁵

⁴ Pet'r Br. at 18; *see also* Renewable Fuels Association, *Small Refinery Exemptions Reduced 2018 Ethanol Consumption and Blend Rate* (2019), available at <https://ethanolrfa.org/wp-content/uploads/2019/03/Small-Refinery-Exemption-Impact-on-2018-Ethanol-ConsumptionFINAL.pdf>; National Biodiesel Board Letter to EPA, Oct. 17, 2018, available at http://kce.informz.net/KCE/data/images/NBB%20%20Letter%20to%20EPA_SREs_Oct2018.pdf.

⁵ EPA, *Annual Compliance Data for Obligated Parties and Renewable Fuel Exporters under the Renewable Fuel Standard (RFS) Program*, Table 2, <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/annual-compliance-data-obligated-parties-and#total-rvo> (data current as of Oct. 10, 2018) (JA879). Reductions in obligated transportation fuel largely tracks the retroactively exempted small refinery volumes, with more requests still pending. EPA, *Small Refinery Exemptions*, <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions> (last updated Feb. 21, 2019) (JA886).

Respondent-Intervenors do not contest Petitioner's standing based on procedural injuries.

II. VENUE IS PROPER IN THIS CIRCUIT.

A. Regulation of RINs—National Credits—is Nationally Applicable.

Petitioner is challenging EPA's newly employed means of generating RINs that can be used nationally to meet national requirements.⁶ EPA admits that its decisions allowing so-called "replacement RINs" were separate actions from its exemption decisions for three Wyoming refineries, even if taken "at the same time." EPA Br. at 8. Yet, EPA's venue arguments focus only on the exemptions.⁷ While that is the context for the decisions, that is not the "face" of the challenged actions.

Contrary to EPA's contentions, Petitioner is not examining the "practical" effects of the challenged actions for purposes of venue. Rather, Petitioner is looking at their "legal" effects. EPA Br. at 15 (citing *Am. Petroleum Inst. v. EPA*, No. 09-

⁶ Claiming EPA *could not* publish its decisions, Respondent-Intervenors seek to dismiss Petitioner's claims as untimely and for failing to specifically identify those decisions. Resp't-Intervenors Br. at 9, 18-19. But the 60-day deadline is based on *publication in the Federal Register*, Pet'r Br. at 1-2, and the intervention motions establish that Respondent-Intervenors "fairly infer[red]" the actions on which Petitioner sought review. [Doc. #1748281 at 3-5, #1748316 at 8-11].

⁷ While EPA does not cite any decision holding venue for challenges related to small refinery exemptions is appropriate *only* in the circuit where the exempt refinery is located, EPA Br. at 15-16 (listing cases), a refinery challenging an exemption denial differs from affected stakeholders challenging allowing previously retired RINs to re-enter the *national* market. *Cf. Lion Oil Co. v. EPA*, 792 F.3d 978, 981 (8th Cir. 2015) ("parties agree[d]" challenged *denial* was locally or regionally applicable).

1085, 2010 U.S. App. LEXIS 5744, at *3-4 (D.C. Cir. Mar. 15, 2010)). Unlike the specific applicability determinations at issue in the cases cited by EPA, *id.*, the allowance of new RINs here does have legal effects beyond Wyoming.⁸ See Pet'r Br. at 34-35. While the exempt refineries happen to be located in Wyoming, even EPA and Respondent-Intervenors focus on EPA "practice" of unretiring RINs (*i.e.*, EPA applying the same decision to others). Given the lateness of the recent rash of exemption requests and this "practice," likely other refineries, not just Respondent-Intervenors, may have retired prior-year RINs that are now expired, facing the same "problem," as evidenced by a recent request by a California-based small refinery.⁹ EPA ignores the very real problems in tracking national credits and compliance if there are inconsistent decisions with respect to the validity of these RINs in the Tenth, Fourth, and potentially Ninth Circuits (among others).¹⁰ See Pet'r Br. at 35.

Thus, the mere fact that EPA (seemingly) first decided to allow "replacement RINs" related to three Wyoming facilities should not determine venue here. Rather, the face of the action—allowing RINs that can be held and used nationally—is nationally applicable.

⁸ HollyFrontier Corporation—headquartered in Texas (in the Fifth Circuit)—includes "reinstate[d]" RINs with its corporate holdings. See HollyFrontier Corp., 2018 10-K, at 41, <http://investor.hollyfrontier.com/node/19866/html>.

⁹ Kern Oil & Refining Co., Notice of Intent to Sue, at 2-3, Feb. 7, 2019, *available at* https://www.epa.gov/sites/production/files/2019-02/documents/kor_noi_2_7_2019.pdf.

¹⁰ See EPA, *Small Refinery Exemptions*, *supra* n.5 (JA886); see also *infra* n.19.

B. EPA's Voluntary Choice to Expand its Decision on Remand Does Not Grant the Tenth Circuit Venue.

Making a passing reference to “judicial comity,” EPA only claims this case’s “procedural posture” favors venue in the Tenth Circuit. EPA Br. at 11, 19 (citation omitted). But the preferred forum of the refineries’ owners is irrelevant to whether the D.C. Circuit is the “appropriate circuit” under 42 U.S.C. §7607(b)(1) here.¹¹ *Id.* Petitioner was not a party in that case. *See Nw. Forest Res. Council v. Dombeck*, 107 F.3d 897, 901 (D.C. Cir. 1997) (“The decisions invoking the principle [of comity] involve circumstances in which the plaintiff in the later federal suit was a party to the earlier action involving the same issues and subject matter.”) (citations omitted).

Importantly, EPA does not dispute that the Tenth Circuit’s decision said nothing about retired RINs. Instead, at “Sinclair[’s]” request, EPA chose to address RINs retired *after* the appeals were brought in the Tenth Circuit. *See* R-6 (JA651-652). This differs from the decision cited to support EPA’s argument, *Ill. Commerce Comm’n v. ICC*, 848 F.2d 1246, 1248 (D.C. Cir. 1988), *cited in* EPA Br. at 20, where the court’s consideration included whether the agency complied on remand with “the specific requirements previously articulated by [that] court.”

¹¹ EPA originally sought venue in the D.C. Circuit. *See* EPA Mot. to Hold Case in Abeyance, ¶¶3-4, *Sinclair Wyoming Ref. Co. v. EPA*, No. 14-1209 (D.C. Cir. filed Dec. 1, 2014) [Doc. #1524834].

Now, EPA argues that the Tenth Circuit is appropriate because the new “replacement RINs” were needed to provide “meaningful” relief. But the relief obtained from the Tenth Circuit is that it potentially made it easier for these refineries to receive additional *extensions*. 42 U.S.C. §7545(o)(9)(B).

EPA provides no explanation why these refineries are situated any differently than any other regulated entity that must decide whether to comply with an agency action they challenge as improper. Nonetheless, EPA takes great pains to explain that the appeals were taken *before* RINs were retired. EPA Br. at 6-9. Presumably this is to create sympathy due to litigation delay. But neither EPA nor Respondent-Intervenors dispute that the refineries could have claimed a deficit while they appealed. Pet’r Br. at 29. And there appears to have been little to no effort to expedite the case or seek relief from enforcement of the obligations, such as an administrative stay.¹² Thus, any predicament EPA and the refineries were purportedly trying to remedy were of their own doing and should not be the basis for determining venue under 42 U.S.C. §7607(b)(1).

C. Dismissal Based on Venue Is Unwarranted.

Even if EPA were correct on venue, which it is not, EPA provides no rationale for dismissal over transfer. EPA Br. at 20 (citing *Dalton Trucking, Inc. v. EPA*, 808

¹² EPA notes earlier-filed appeals by two of the refineries were not pursued. EPA Br. at 7 n.2.

F.3d 875, 881-82 (D.C. Cir. 2015)). Contrary to EPA's implications, venue is not jurisdictional. *Texas Mun. Power Agency v. EPA*, 89 F.3d 858, 862 (D.C. Cir. 1996).

EPA cites *Dalton Trucking v. EPA* to argue for dismissal, but, there, the Court dismissed the petition because the petitioner also filed in the Ninth Circuit and objected to venue in the D.C. Circuit. 808 F.3d at 880. Here, Petitioner could not have filed a petition in the Tenth Circuit because it did not know the scope of EPA's secret decisions. Fairness and the interests of justice dictate transfer over dismissal.

III. THE STATUTE AND EPA'S REGULATIONS FORECLOSE EPA'S ABILITY TO GRANT NEW "REPLACEMENT RINS."

A. Where the Statute Requires Regulations for Generation of "Credits" (*i.e.*, RINs), EPA Cannot Use Adjudications to Invent New Avenues for Creating RINs.

EPA concedes that "[n]either the statute nor EPA's implementing regulations address the precise situation arising in these adjudications." EPA Br. at 21. Because there is no authority for EPA's actions, EPA attempts to equate its claimed authority to "flesh out its rules" via adjudication with filling a "regulatory gap." *Id.* at 11, 21. But the D.C. Circuit has "emphatically agree[d]" that "[n]eed for regulation cannot alone create authority to regulate." *Exxonmobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1088 (D.C. Cir. 2002) (citation omitted).

EPA does not contend that Congress left a gap for EPA to fill to implement the statute. In fact, there is no such gap. Congress identified the circumstances when small refineries can generate RINs, 42 U.S.C. §7545(o)(9)(C), which EPA admits

“do not address this situation.” EPA Br. at 27. Where Congress has spoken, that it did not allow this situation is the end of the matter.

Instead, EPA argues it has discretion to utilize adjudications to expand its delegated authority. But the cases on which it seeks to rely are inapposite.

First, EPA cites *Shays v. FEC*, 528 F.3d 914, 930 (D.C. Cir. 2008), and *Council for Urological Interests v. Burwell*, 790 F.3d 212, 226 (D.C. Cir. 2015). But, in those cases, this Court upheld regulations the petitioner claimed used vague terms, finding the agency could refine their meaning through adjudication. Here, EPA is not attempting to define vague regulatory terms. There is no applicable regulation.

Second, EPA contends it has authority to announce “new principles” via adjudication, citing *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 497 (D.C. Cir. 2015). But that case involved the use of a standard in applying a regulation, finding the decision did not involve a substantive legal addition. *Id.* Further, this Court distinguished that case from when the agency is amending a regulation. Here, in conceding its regulations do not allow these new “replacement RINs,” EPA admittedly is amending regulations promulgated through rulemaking. In so doing, rulemaking here was also required. *See* Pet’r Br. at 23.

Finally, EPA cites to *Conference Group, LLC v. FCC*, 720 F.3d 957, 966 (D.C. Cir. 2013), to contend it can “address legal issues ‘for the first time’” via adjudication. But, again, that case did not involve assertion of new authority. There,

the challenged action agency “represent[ed] no more than an interpretative precedent for the [agency] to apply.” *Id.* In other words, it was interpreting its statutory obligations. Here, EPA admits the statute does not address the situation, and, as such, EPA was creating new law. But, whether or not the challenged actions here are “rules,”¹³ the statute requires regulations. 42 U.S.C. §§7545(o)(2)(A)(i), (iii), (o)(5)(A), (o)(7)(A), 7607(d)(1)(E); *see also Michigan v. EPA*, 268 F.3d 1075, 1088 (D.C. Cir. 2001) (“The statute here is neither silent nor ambiguous; it requires the use of notice and comment proceedings....”). EPA attempts to avoid this by claiming its decision was done in the context of granting an exemption under 42 U.S.C. §7545(o)(9). EPA Br. at 24. But that section includes a provision on small refinery “credits,” referring to the statute’s prescriptive credit provisions that outline when credits can be generated, how long they last, and how they can be used. 42 U.S.C. §7545(o)(5), (o)(9)(C); *cf. Neustar, Inc. v. FCC*, 857 F.3d 886, 892 (D.C. Cir. 2017) (involving statute requiring agency generally “establish regulations to implement the requirements” and allowing regulations to establish “selection process” for administrators where selection occurred via adjudication).

Thus, even if EPA had discretion to grant exemptions through adjudication, its regulation outlining the process does not address RINs, and such discretion

¹³ They are rules. 5 U.S.C. §551(4) (defining “rule” to include, *e.g.*, “practice requirements”).

cannot be expanded to grant EPA additional authority to allow new “replacement RINs” to serve as RFS credits when Congress defined that authority. Moreover, Congress’s clear intent was to provide market participants an opportunity to understand and comment on RIN generation and use compliance and credit provisions. This makes sense given the need for market transparency. *See, e.g.*, 80 Fed. Reg. 77,420, 77,509 (Dec. 14, 2015) (JA746) (providing notice-and-comment on refunding submitted waiver credits). Thus, EPA’s using adjudications to create new authority to generate RINs not provided in the statute or regulation was an abuse of discretion. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974), *cited in* EPA Br. at 21.

B. The Absence of a Statutory Prohibition Is Not a Grant of Authority.

EPA appears to base its claimed authority on Congressional silence. EPA Br. at 21. But “it is *statutory authorization* alone that gives [an agency] the authority to regulate, and in the absence of such authority, [the agency’s] action ‘is plainly contrary to law and cannot stand.’” *Exxonmobil Gas Mktg. Co.*, 297 F.3d at 1088 (quoting *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (internal quotation omitted)).

Congress’s purported failure to address this “precise situation” does not authorize EPA to act, much less be the “zenith” of agency discretion. This Court has “repeatedly admonished federal agencies that jurisdiction may not be *presumed*

based solely on the fact that there is not an express withholding of jurisdiction.” *Exxonmobil Gas Mktg. Co.*, 297 F.3d at 1088 (citations omitted); *see also Atlantic City Elec. Co.*, 295 F.3d at 8-9; *Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119-20 (D.C. Cir. 1995); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060-61 (D.C. Cir. 1995).

As noted, Congress was not silent on this issue. The statute provides only that small refineries that waive their exemption can generate RINs. 42 U.S.C. §7545(o)(9)(C). While EPA asserts this provision is not implicated because it does “not address this situation,” EPA Br. at 27, Congress carefully crafted the credit provisions to ensure meaningful volumes and was *not* required to specify that EPA was prohibited from allowing such credits in other situations, particularly where those credits, which were to allow participants to take advantage of efficiencies (not avoid obligations), *could reduce* the volumes EPA was required *to ensure*.

The statute further gives credits only a 12-month life. 42 U.S.C. §7545(o)(5)(C). EPA agrees that the concerns with improperly extending the life of credits stemmed from “frustrating the Congressional purpose in enacting the RFS program”—that is, promoting annual increases in production of biofuels. EPA Br. at 27-28. EPA then contends, however, that those concerns differ from those here, because EPA was concerned with addressing a “lengthy litigation-related delay.” *Id.* It matters not why EPA granted previously expired RINs new life. What matters are the legal impacts of EPA’s actions. EPA also ignores that this limit on RINs also

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protects against RIN-market speculation by ensuring an ongoing supply of *biofuels* to meet the RFS requirements. 72 Fed. Reg. 23,900, 23,944 (May 1, 2007) (JA677). In allowing new RINs to “stand in the place of the original [expired] RIN,” the RIN is given new life beyond that Congress and EPA regulation allow, reducing the need for biofuel production in later years and undermining Congress’s goals. *Cf. Niagara Mohawk Power Corp. v. Fed. Power Comm’n*, 379 F.2d 153, 158 (D.C. Cir. 1967), *cited in* Resp’t-Intervenors Br. at 11 (recognizing agency discretion provided action “conforms with the purposes and policies of Congress and does not contravene any terms of the Act”).

Respondent-Intervenors claims (at 35-38) are disputed by their own earlier position, in the record. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

As explained in Petitioner’s opening brief (at 49-50), the statute (and EPA’s regulations) provide for *prospective* exemptions, allowing requests for *extensions* in the face of ongoing disproportionate economic hardship. Even if a small refinery challenged a denial of that request, the statute provides a remedy—that refinery can

carry a deficit. 42 U.S.C. §7545(o)(5)(D). The only gap created is by EPA in allowing small refineries to wait to seek an exemption until the compliance year or much later (*i.e.*, allowing small refineries to seek retroactive relief).

While EPA and Respondent-Intervenors contend Petitioner should be challenging the exemptions, *e.g.*, EPA Br. at 26, 28, Petitioner properly explained why EPA's purported "gap" has been manufactured by EPA's impermissibly expansive reading of the small refinery exemption provision.¹⁴ Pet'r Br. at 28-29, 49-54. Moreover, Petitioner is allowed to challenge the portrayal of the exemption requests as being "[REDACTED]." *E.g.*, Resp't-Intervenors Br. at 8. EPA does not dispute these arguments. As such, any purported "regulatory gap" is not proper grounds to authorize EPA's actions here.

C. Calling the New RINs "Replacements" Cannot Avoid the Prohibitions in EPA's Regulations.

RIN availability is a key determinant in understanding demand and supply under the RFS program. The market bases decisions on whether *new biofuel production* is needed to meet the volume requirements by tracking RIN availability. Under EPA's regulations, once a RIN is retired or expired, it is no longer available

¹⁴ Citing no statutory or regulatory authority, EPA refers to its "practice" to "refund the RINs" used for compliance, asserting "nothing bars EPA from 'unretiring' RINs." EPA Br. at 26. But, as explained, the lack of an express prohibition does not equate to a grant of authority. Regardless of its "practice," EPA has no such authority. *See* Pet'r Br. at 26-31.

for compliance. 40 C.F.R. §§80.1427(a)(6)(ii), 80.1428(c). Allowing RINs taken out of the system to re-enter the market disrupts and undermines the functioning of the market and investments made based on expected RFS demand.

To support a functioning RIN market, EPA's RFS regulations outline when a RIN can be generated, how the RIN can be used, and, importantly, when that RIN is no longer available for use. Recognizing the original RINs were, in fact, retired and even expired, EPA attempts to avoid the clear prohibitions under its regulations, *see* Pet'r Br. at 30-31, by arguing that the "replacement RINs stand in the place of the original RINs," which "*were* based on the production of a biofuel." EPA Br. at 25. Setting aside that there is no record evidence supporting this conclusory statement, RINs have a "born-on" date based on the year the biofuel was produced. 40 C.F.R. §80.1425(b). The so-called "replacement RINs" have a "born-on" date of a later year in which the biofuel was not produced, but all other things would be equal. EPA's admission establishes a violation of 40 C.F.R. §80.1460(b)(6), which prohibits generation of "a RIN for fuel for which RINs have previously been generated."

EPA acknowledges it "allowed Sinclair and HollyFrontier to generate *new* RINs to stand in the place of the retired RINs." EPA Br. at 26. EPA does not dispute that its regulations render invalid RINs that are a "duplicate" of a previously generated RIN. 40 C.F.R. §80.1431(a)(1)(i). Creation or transfer of an invalid RIN is prohibited. *Id.* §80.1460(b)(2). "No person shall cause another person to commit

an act in violation of any prohibited act under this section.” *Id.* §80.1460(e). No matter what EPA calls them, the “new” RINs are intended to take the place of prior RINs; *i.e.*, they are duplicates of the original RINs just reborn to have a longer life. Thus, EPA’s regulations *do* prohibit “replacement RINs.”

D. Even if EPA had Authority to Address this “Precise Situation,” EPA’s Decision Was Arbitrary.

EPA attempts to argue that its decision was “a reasonable solution to the problem” it faced.¹⁵ EPA Br. at 28. But, even if it was proper for EPA to try to resolve a problem *it created*, EPA was still obliged not to violate other parts of the statute in doing so.

Rather than explain its failure to consider other alternative solutions, EPA contends comments that it must ensure the volumes are met if it grants exemptions retroactively are “a far cry from” suggesting “how to effectuate the exemptions after remands from the Court of Appeals.” EPA Br. at 29. Having failed to provide notice, surely EPA is not suggesting that the public should have anticipated and commented on specific alternative solutions. Nevertheless, these comments show that EPA should have been aware of its obligations to ensure the required volumes are met *each year* and should have considered solutions consistent with all its obligations.

¹⁵ Although EPA asserts that “the small refineries over-complied with their 2014 and 2015 RFS obligations,” EPA does not (and cannot) argue that the statute authorizes generation of credits as a result. EPA Br. at 28; *see* Pet’r Br. at 26-27.

And, given EPA's own concerns with RIN-market speculation and manipulation and in light of the harms to the biofuels industry, it cannot be that EPA's decision was reasonable. EPA's actions allowed hundreds of millions of new RINs to re-enter the market. Yet, the record is simply devoid of any consideration of how the purported "remedy" may affect the RIN markets or volume requirements. This is arbitrary.

[REDACTED]

While Petitioner believes the public could have identified more appropriate remedies if provided the chance, there is simply no analysis by EPA as to whether this alternative (or any other) would have had less of an impact on the market or volumes. A regulatory choice can be upheld only where "EPA has considered the relevant factors." EPA Br. at 13 (citation omitted). EPA cannot narrowly frame the "problem" it is addressing to avoid doing so, especially where they relate to EPA's statutory obligations and Congress's objectives.

IV. PETITIONER HAS PROPERLY RAISED GROUNDS ARISING AFTER CLAIMS, AND EPA'S ACTIONS HAVE REOPENED THE TIME FOR SEEKING REVIEW.¹⁶

Despite acknowledging that EPA's "practice" of granting exemptions was not done through a public process, EPA Br. at 23, EPA contends that there are no new

¹⁶ In a footnote, EPA contends that the 2012 Federal Register notice is not part of this challenge because it "cannot be fairly inferred from the Petition for Review or any contemporaneous filings." EPA Br. at 9 n.3 (citing *Extravision Holdings, LLC v. FCC*, 202 F.3d 311, 312 (D.C. Cir. 2000)). But Petitioner asserted a challenge to

grounds for raising objections to EPA's handling of the small refinery exemptions because the new grounds are "simply case-specific applications of a long-standing practice." *Id.* at 12. But the public was not aware of any such *practice*, and the public "cannot be expected to divine the EPA's unspoken thoughts." *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1992) (citation omitted).

Citing to statements that it may grant exemptions after the standards are set, EPA Br. at 12, EPA appears to contend the public should have known that EPA would broadly expand its authority as it has done recently, granting unprecedented numbers of *new* exemptions (not extensions) later and later, while denying none. This simply mischaracterizes what EPA told the public. Upon learning of EPA's broad expansion of its authority, Petitioner promptly brought its claims.

A. EPA's Changes to the Small Refinery Exemption Regime Constitute New Developments Raising New Grounds for Seeking Review.

Petitioner has identified more than adequate grounds arising after the original sixty days for seeking review of prior EPA actions. As an initial matter, EPA

EPA's determination that it can grant exemptions after it sets the standards, which it affirmed at 77 Fed. Reg. 1320, 1340 (Jan. 9, 2012) (JA719). EPA was not misled. Unlike in *Extravision Holdings*, the 2012 Federal Register notice was identified in Petitioner's initial filings (albeit submitted after initial settlement talks). 202 F.3d at 313; Doc. #1759653, #1759693, #1759657, #1759659. Regardless, EPA does not deny it has made this finding, including in a rulemaking the Petition identified. *See* EPA Br. at 32 (noting the same finding related to 2016 standards). The challenge, therefore, is properly before this Court.

incorrectly conflates the challenged action—*i.e.*, the determination that it can grant retroactive exemptions and not adjust the standards—with Petitioner’s claimed grounds arising after—*i.e.*, the substantial expansion of the exemptions granted to include exemptions granted in the compliance year and even after the compliance deadlines. EPA Br. at 30. Importantly, EPA ignores that, in 2017, it almost quadrupled the number of exemptions granted, although the statute and regulations refer only to “extensions,” not new exemptions. Pet’r Br. at 44-46. Based on EPA’s own data, this expansion could allow billions of RINs to re-enter the market, substantially reducing the need for biofuel production, devaluing RINs generated from actual production, and undermining the incentives Congress created.

EPA argues these significant changes to the public’s understanding of the small refinery exemptions have been its “practice” well before 60 days prior to when Petitioner filed its action. EPA Br. at 31. But, to the public’s knowledge, the statute and regulations referred to *prospective* exemptions, which EPA does not address.¹⁷ See Pet’r Br. at 49-52. The standards are to be set the year *before* the applicable compliance year; thus, an exemption granted after November 30 could still be granted before the compliance year begins. While EPA has not always met that deadline, exemptions granted after the standards are set could still be done

¹⁷ Admitting its regulations do not address the “unretiring” of RINs, EPA Br. at 26, this is unlike *Nat’l Biodiesel Bd. v. EPA*, 843 F.3d 1010, where the Court found the challenged action followed the requirements found in the regulations.

prospectively, i.e., before the prior extension ended (and no RINs need be retired). Further, where's the *hardship* when the refinery *can* comply? Pet'r Br. at 49-50. Here, Respondent-Intervenors (Br. at 8-9) acted like an obligated party, admitting that they were able to accumulate sufficient RINs to meet their obligations.

Instead, EPA and Respondent-Intervenors appear to fault Petitioner for not filing its challenges sooner or not challenging specific exemptions when EPA's "practice" was done behind closed doors.¹⁸ But, again, EPA has expanded this "practice" to create extremely broad authority, granting more and more exemptions, later and later. In other words, the extent of EPA's claimed authority was not known until July 2018.¹⁹ Significantly, none of EPA's citations identify its intended "practice" to "unretire" RINs if it grants exemptions after the compliance deadlines. EPA Br. at 31-32. And the public cannot piece the puzzle together with vague and buried references to actions occurring *years after* EPA promulgated its regulations. Even so, as Petitioner argued, this Court has allowed review when EPA annually

¹⁸ At best, EPA references examples of when it decided on exemptions after the standards were set, but these involved *denials* and made no mention of "unretiring" RINs. EPA Br. at 32 (listing cases).

¹⁹ Even now, Respondent-Intervenors claim Petitioner lacks standing because it cannot establish EPA will continue to grant retroactive exemptions. Resp't-Intervenors Br. at 17. But Petitioner noted there were more requests pending, and five were recently granted for compliance year 2017, increasing the 2017 exempted volume to over 1.8 billion gallons. *Compare infra* n.21, with EPA, *Small Refinery Exemptions*, <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions> (last updated Mar. 14, 2019) (JA888).

follows its practice, and subsequent information calls it into question. Pet'r Br. at 45, and n.41. EPA's contention that Petitioner is only complaining of a "greater impact" to claims it could have brought earlier, *id.* at 34, must be rejected.

EPA and Respondent-Intervenors both attempt to rely on a 2016 memorandum that, on its face, only applied to the 2016 compliance year and, thus, cannot be evidence of any "long-standing practice." EPA Br. at 32; Resp't-Intervenor Br. at 5-6. While it is unclear if EPA is contending that Petitioner could have challenged the 2016 memorandum, it appears inconsistent with EPA's regulations and, regardless, it says nothing to question the public's view that requests for "extensions" would be limited in number. Further, it states exemption requests should be submitted *before* the compliance deadlines and says nothing about retirement (or unretirement) of RINs.²⁰

Now, exemptions have been sought for 2016 *well after* the compliance deadlines. Moreover, the exemptions granted here, for example, were not based on the financial condition of the company, but "structural" conditions of which any operating company should be aware ahead of time to be able to operate the next year. *See* Resp't-Intervenors Br. at 8 (citing Doc. #1762885, Attach. A). As such, the

²⁰ EPA Dec. 6, 2016 Mem., *available at* <https://www.epa.gov/renewable-fuel-standard-program/information-be-submitted-2016-renewable-fuel-standard-rfs-small>.

relevance of the 2016 memorandum with respect to Petitioner's grounds arising after claims is suspect.

In short, the five RIN "replacement" decisions, along with EPA's new interpretation of the phrase "at any time" to essentially be unlimited, crystallized the potential impacts of EPA's earlier statements. This expanded authority has created new consequences for Petitioner by allowing previously retired, including expired, RINs to reenter the system, undermining the incentives created by Congress. EPA data also shows that it is no longer "ensuring" the volumes are being met, Pet'r Br. at 15, which was not the case under EPA's prior "practice," raising new grounds for objecting to EPA's prior actions.

B. EPA Has Reopened the Challenged Agency Actions.

In refuting Petitioner's claims that EPA actually and constructively reopened its earlier determinations, EPA again relies on the information that only EPA had available. EPA Br. at 37-38. Again, EPA ignores the recent substantial expansion in the number of exemptions (which were supposed to be "extensions") granted compared to prior years, with many granted *after* the compliance deadlines. Thus, contrary to EPA's assertions, this did reopen EPA's determination that it could grant retroactive exemptions, because the public was not previously aware of the extent of EPA's claimed authority.

Instead, EPA references a footnote in which EPA explained that its estimate of available carryover RINs grew because, among other things, 390 million RINs had been exempted in 2016. EPA Br. at 38 (citing 82 Fed. Reg. 34,206, 34,213 n.22 (July 21, 2017)). Based on this footnote, Petitioner was somehow supposed to know that EPA had granted more exemptions that year than it had in 2013-2015. But the actual number of exemptions granted was not known until much later.²¹ And, EPA data had shown the 2016 volumes were met.²² Regardless, in July 2018, EPA indicated that the exempted volumes had doubled since July 2017, 83 Fed. Reg. 32,024, 32,029 (July 10, 2018) (JA825), actually demonstrating that EPA had granted exemptions *well after the compliance year and deadline of March 2017*. The significant expansion of the program, and EPA's claimed authority to "unretire" RINs, including expired ones, altered biofuel producers' "financial incentives for challenging the regulation." *Sierra Club v. EPA*, 551 F.3d 1019, 1026 (D.C. Cir. 2008) (citing *Kennecott Utah Copper Corp. v. Dep't of Interior*, 88 F.3d 1191, 1227 (D.C. Cir. 1996)); *see also* Pet'r Br. at 44-46.

²¹ EPA, *Small Refinery Exemptions*, <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions> (last updated Feb. 21, 2019) (JA886).

²² Table 2, Ex. A to Mot. to Supp. [Doc. #1771662] (JA854-855); Table 2, EPA-HQ-OAR-2017-0091-4898 (JA866-867).

C. EPA Cannot Rely on Post-Hoc Rationalizations to Defend its Regulations.

Ignoring all other terms in the statute and regulations, EPA asserts that the statute's reference to submitting petitions "at any time" means its regulation is "valid." EPA Br. at 38. While Petitioner does not request that 40 C.F.R. §80.1441 be vacated (it requested remand, which can eliminate this "practice"), EPA provides no citation where it explained its reading of "at any time" as having no limitations. *Id.* Such a reading is absurd in the context of annual standards. Pet'r Br. at 51. In fact, EPA previously indicated the statutory phrase was not unlimited, and that it could, as Petitioner seeks here, impose timing requirements for refineries to seek exemptions. *Id.* at 52. EPA should not be able to rely on post-hoc rationalizations to argue that its clear change in position has not reopened its prior determinations.

EPA asserts it has "consistently explained why, after the annual standards have been set, EPA does not alter the standards to account for later small refinery exemption decisions." EPA Br. at 39 (citations omitted). EPA cites to its claim that "[p]eriodic revisions to the standards to reflect waivers issued to small refineries or refiners would be inconsistent with the statutory text and would introduce an undesirable level of uncertainty for obligated parties." 75 Fed. Reg. 76,790, 76,804 (Dec. 9, 2010) (JA708), *cited in* EPA Br. at 39. But EPA also stated that it believed this finding was consistent with its obligation to ensure the volumes because Congress allowed for "some imprecision" in the volumes being met. 77 Fed. Reg. at

1340 (JA719). Under EPA's new world order, however, it is intentionally reducing the required volumes by almost 2 billion gallons (and possibly more since requests remain pending). *See, supra* n.19.

EPA then goes on to discuss an alternative not addressed here. EPA Br. at 39 (citing Nat'l Biodiesel Bd. Br. at 13-20, *Am. Fuel & Petrochemical Mfrs.*, No. 17-1258 [Doc. #1742880]).²³ Petitioner is not asking EPA to speculate on anything. Here, EPA knows (or will know) the exemptions granted and the exempted volumes, and EPA has authority to adjust later volumes to ensure a prior year's volumes that were not met. Pet'r Br. at 55. Moreover, Petitioner is arguing that EPA's regulations should require requests be *timely* submitted to seek *prospective* relief, obviating the need to try to predict the number of "retroactive" exemptions.

Finally, EPA contends, also for the first time, that EPA would have no record before it as to the small refinery's financial circumstances during the compliance year.²⁴ EPA Br. at 39. The record provides no explanation why financial information for almost the full compliance year is necessary. First, the statute contemplates consideration of a facility's economic hardship in the future. Pet'r Br. at 49. Second,

²³ EPA, of course, fails to mention it is seeking to dismiss those claims for failure to raise the objections with specificity. EPA Br. at 69-72, No. 17-1258 (D.C. Cir. Oct. 25, 2018) [Doc. #1757157]. Yet, EPA itself considered whether to account for retroactive exemptions in light of full information about its expansion of those exemptions, while simultaneously withholding that information from the public.

²⁴ EPA's newly claimed rationale for supporting petitions "at any time" is evidence that it reconsidered and reaffirmed these prior determinations.

EPA has previously indicated it was not impractical to review exemption requests earlier.²⁵ Third, EPA granted the exemptions here not based on financial conditions. On the record here, such information is not necessary for EPA to determine whether to extend the exemption. Thus, EPA's claims are meritless.

V. IF THIS COURT BELIEVES THE CASE SHOULD BE HELD IN ABEYANCE PENDING FURTHER EPA ACTION, IT SHOULD IMPOSE A DEADLINE FOR EPA TO RESPOND.

EPA alternatively requests this Court hold the “grounds arising after” claims in abeyance while it considers Petitioner’s reconsideration petition. EPA Br. at 34-35 (citing *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 666 (D.C. Cir. 1975)). For the reasons explained in its opening brief (at 47-49), Petitioner does not believe *Oljato* requires waiting for further EPA action, as there is a distinct difference between new information not previously presented to EPA and new authority claimed by EPA that the public is asking it to reconsider, which it has already reaffirmed.

Although EPA has refused to provide a record in this case, there is a “record for its decision and reasons outside of litigation.” EPA Br. at 35 (citing *Oljato*, 515 F.2d at 666-67). EPA asserts it has explained its rationale for continuing to grant retroactive exemptions. *Id.* at 39. And, the record showing EPA’s claimed authority for expanding those exemptions is within EPA’s purported recent practice of

²⁵ EPA-HQ-OAR-2017-0091-4990 at 216 (JA818).

granting exemptions. Further, to address the legal questions before this Court, there is more than ample record for this Court to review Petitioner's claims.

Moreover, as noted above, EPA continues to grant exemptions later and later. EPA should not be able to use *Oljato* to delay judicial review. If this Court were to contemplate granting EPA's requested alternative relief, this Court must require EPA to issue its finding within a specified time. EPA should not be allowed to sit on the reconsideration petition and continue to grant exemptions retroactively, undermining the annual volume requirements and perpetuating regulatory uncertainty, without judicial oversight.

CONCLUSION

For the foregoing reasons, the petition for review must be granted.

Dated April 1, 2019

Respectfully submitted,

/s/ Jerome C. Muys, Jr.

Jerome C. Muys, Jr.
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Washington, DC 20003

*Counsel for Producers of Renewables United
for Integrity Truth and Transparency*

CERTIFICATION PURSUANT TO FRAP 32(a)(7)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), the undersigned hereby certifies that the foregoing Final Reply Brief of Petitioner is 6,473 words in compliance with the word limit of 6,500 words in Rule 32(a)(7)(B)(i).

Dated April 1, 2019

Respectfully submitted,

/s/ Jerome C. Muys, Jr.

Jerome C. Muys, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2019, I caused to be electronically filed the Public Version of the Final Reply Brief of Petitioner with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the Court's CM/ECF system, which will serve counsel of record. Additionally, the Under Seal version of the Final Reply Brief was filed by hand with the clerk of the Court with copies served on Counsel of Record via first class mail.

/s/ Jerome C. Muys, Jr.

Jerome C. Muys, Jr

Message

From: Mylan, Christopher [Mylan.Christopher@epa.gov]
Sent: 3/11/2019 8:03:04 PM
To: Bunker, Byron [bunker.byron@epa.gov]; Weihrauch, John [Weihrauch.John@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]; Hengst, Benjamin [Hengst.Benjamin@epa.gov]
CC: Meekins, Tanya [Meekins.Tanya@epa.gov]; Parsons, Nick [Parsons.Nick@epa.gov]; Birgfeld, Erin [Birgfeld.Erin@epa.gov]
Subject: RE: prep for SRE decisions on Thursday
Attachments: Desk Statement 14 March 2019_CM.docx

Thank you for sharing, Byron. I made a few edits and put the language in a more traditional desk statement format. Nothing substantive.

Thanks,
 Chris

From: Bunker, Byron
Sent: Monday, March 11, 2019 2:32 PM
To: Weihrauch, John <Weihrauch.John@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Cc: Meekins, Tanya <Meekins.Tanya@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Birgfeld, Erin <Birgfeld.Erin@epa.gov>; Mylan, Christopher <Mylan.Christopher@epa.gov>
Subject: RE: prep for SRE decisions on Thursday

Attached is the first draft of a desk statement and Q&As. Please send any suggested edits or additions to Janet and me.

Thanks,

Byron

Byron Bunker
 Director Compliance Division
 Office of Transportation and Air Quality
 Environmental Protection Agency
 2000 Traverwood Drive
 Ann Arbor, MI 48105
Bunker.Byron@epa.gov
 Phone: (734) 214-4155

Ex. 6 Personal Privacy (PP)

From: Weihrauch, John
Sent: Monday, March 11, 2019 2:16 PM
To: Cohen, Janet <cohen.janet@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Cc: Meekins, Tanya <Meekins.Tanya@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Birgfeld, Erin <Birgfeld.Erin@epa.gov>; Mylan, Christopher <Mylan.Christopher@epa.gov>
Subject: RE: prep for SRE decisions on Thursday

Janet,

Chris McKenna, Ben Larson and I had a quick conversation. If you can include me/Ben/Jung (one or all) as CCs on the electronic notices, we will respond immediately to each company with guidance and forms necessary for us to start the unretirement remedial action process with them.

Thanks,
John

From: Cohen, Janet
Sent: Monday, March 11, 2019 2:02 PM
To: Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Cc: Meekins, Tanya <Meekins.Tanya@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Weihrauch, John <Weihrauch.John@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Birgfeld, Erin <Erin.Birgfeld@epa.gov>; Mylan, Christopher <Mylan.Christopher@epa.gov>
Subject: prep for SRE decisions on Thursday

Ben,
Just doing a little advance planning here because the decisions we're about to issue Thursday will be the first set we've done without Tia's steady hand making sure everything goes smoothly. Also because it's the first set we've done with a concurrent web site update.

Ex. 5 Deliberative Process (DP)

After the electronic versions go out we overnight the original hard copies to the receiving refineries. Since you will be signing in DC probably easiest for the DC team to handle the mailing.

Any other logistics we need to talk about now?

- J. -

Message

From: Nelson, Karen [nelson.karen@epa.gov]
Sent: 2/6/2019 3:22:57 PM
To: Cohen, Janet [cohen.janet@epa.gov]
Subject: SRE Briefing for Wheeler
Attachments: 2_5_19 DRAFT small refinery briefing for Administrator Wheeler.pptx

Hey Janet,

Here is the version that I edited last night – but I noticed that there are two other versions on sharepoint. I hadn't noticed that yesterday, so I thought I was updating the current version. If you want to send me the current version, I can import the changes I made to that version.

Thank you for your time.

Sincerely,
Karen Nelson
Compliance Division
(734) 214-4657

Message

From: Hengst, Benjamin [Hengst.Benjamin@epa.gov]
Sent: 4/13/2019 1:29:09 AM
To: Bunker, Byron [bunker.byron@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]; Meekins, Tanya [Meekins.Tanya@epa.gov]; Stahle, Susan [Stahle.Susan@epa.gov]; Parsons, Nick [Parsons.Nick@epa.gov]; Nelson, Karen [nelson.karen@epa.gov]; Michaels, Lauren [Michaels.Lauren@epa.gov]
CC: Mroz, Jessica [mroz.jessica@epa.gov]; Meekins, Tanya [Meekins.Tanya@epa.gov]
Subject: Loeb sack letter
Attachments: AL-18-000-8567_incoming Loeb sack SREs.pdf; AL-18-000-8567_Loeb sack et al draft response_4-12-19.docx

Hi SRE team:

You have done a great job in reducing the # of SRE-related letters in our queue. The only Congressional letter left is the Loeb sack letter. I've done a thorough scrub/re-working letter of this, and at this point we *really* need to finish this up. OCIR is very, very much wanting to get this out.

At this point, I think this only needs a quick look from OGC and OTAQ. Can folks please edit the attached and circulate? Once Byron says this is good to go, then Jessie can make sure Tanya gets it to OCIR (Karen T.). I've tried to make it as up-to-date as possible, and I've gone back to look at all the various edits/comments made over the past several months. At this point, I'm hoping it needs only minor tweaking.

Thanks,
Ben

Message

From: Stahle, Susan [Stahle.Susan@epa.gov]
Sent: 2/5/2019 2:58:46 PM
To: Cohen, Janet [cohen.janet@epa.gov]; Bunker, Byron [bunker.byron@epa.gov]; Hengst, Benjamin [Hengst.Benjamin@epa.gov]; Orlin, David [Orlin.David@epa.gov]; Parsons, Nick [Parsons.Nick@epa.gov]; Manners, Mary [manners.mary@epa.gov]; Machiele, Paul [machiele.paul@epa.gov]
Subject: RE: please review updated version of wheeler briefing
Attachments: 2_4_19 DRAFT small refinery briefing for Administrator Wheeler working_all edits so far (ss).pptx

Here are my edits/comments (very minor).

I would ask that you delete slide 32. It is outdated and duplicative.

Thanks.

Susan Stahle
 Air and Radiation Law Office
 Office of General Counsel
 U.S. Environmental Protection Agency
 WJCN-7502B
 202-564-1272

From: Cohen, Janet
Sent: Monday, February 4, 2019 5:09 PM
To: Bunker, Byron <bunker.byron@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Manners, Mary <manners.mary@epa.gov>; Machiele, Paul <machiele.paul@epa.gov>
Subject: RE: please review updated version of wheeler briefing

All – here's an updated version that incorporates comments from Byron and Sue, plus BW's suggestion to present decision options. I added slides for policy, timing, and communication decisions but ran out of time to flesh them out completely so please free to add. I posted this rendition to sharepoint(small refinery team documents/briefings/working versions) so we can all continue to work on it.

- J. -

From: Bunker, Byron
Sent: Monday, February 04, 2019 2:35 PM
To: Cohen, Janet <cohen.janet@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Manners, Mary <manners.mary@epa.gov>; Machiele, Paul <machiele.paul@epa.gov>
Subject: RE: please review updated version of wheeler briefing

Adding Paul to our e-mail chain and attaching my suggested edits.

Thanks,

Byron

Byron Bunker

Director Compliance Division
Office of Transportation and Air Quality
Environmental Protection Agency
2000 Traverwood Drive
Ann Arbor, MI 48105
Bunker.Byron@epa.gov
Phone: (734) 214-4155

Ex. 6 Personal Privacy (PP)

From: Cohen, Janet
Sent: Monday, February 04, 2019 1:54 PM
To: Stahle, Susan <Stahle.Susan@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Manners, Mary <manners.mary@epa.gov>
Subject: RE: please review updated version of wheeler briefing

Thanks Sue. I think the purpose of the briefing is to give him enough background to feel he understands the history and context leading up to the decisions that need to be made right away for the 2017 and 2018 petitions. To me that includes knowing that there is active litigation surrounding all these issues, including the basics about who is suing us and what's being challenged. I just don't have any sense about what level of detail is needed.

You're right, there is a more updated version of slide 30. It's called, "Court Decisions on Small Refinery Petition Decisions." The content is:

Ex. 5 Deliberative Process (DP)

I'll wait to hear back from the others and incorporate all comments later today.

- J. -

From: Stahle, Susan
Sent: Monday, February 04, 2019 1:40 PM
To: Cohen, Janet <cohen.janet@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Manners,

Mary <manners.mary@epa.gov>

Subject: RE: please review updated version of wheeler briefing

I have included my edits/comment in the attached.

I don't know if the purpose of this briefing is to also update him on the litigation. That will determine whether you want to keep slides 30-32. I will note all these slides are not up-to-date. I would think there would be a more updated slide 30 in the OGC briefing slides? I haven't attempted to update them until I know whether you want to keep them.

Susan Stahle
Air and Radiation Law Office
Office of General Counsel
U.S. Environmental Protection Agency
WJCN-7502B
202-564-1272

From: Cohen, Janet

Sent: Monday, February 4, 2019 1:11 PM

To: Bunker, Byron <bunker.byron@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Manners, Mary <manners.mary@epa.gov>

Subject: please review updated version of wheeler briefing

One more round before sending to Chris. I edited the previous version a little and checked numbers so hope this is accurate, but more eyes are always a good idea. Also please see my comments and let me know what you think about dropping some of these slides. – j. -

Message

From: Parsons, Nick [Parsons.Nick@epa.gov]
Sent: 2/4/2019 6:12:41 PM
To: Cohen, Janet [cohen.janet@epa.gov]; Bunker, Byron [bunker.byron@epa.gov]; Hengst, Benjamin [Hengst.Benjamin@epa.gov]; Stahle, Susan [Stahle.Susan@epa.gov]; Orlin, David [Orlin.David@epa.gov]; Manners, Mary [manners.mary@epa.gov]
Subject: RE: please review updated version of wheeler briefing
Attachments: 2_4_19 DRAFT small refinery briefing for Administrator Wheeler NLP.pptx

Updated slide 28 w/ exempted RVO percentages.

- Nick

From: Cohen, Janet
Sent: Monday, February 04, 2019 1:11 PM
To: Bunker, Byron <bunker.byron@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Manners, Mary <manners.mary@epa.gov>
Subject: please review updated version of wheeler briefing

One more round before sending to Chris. I edited the previous version a little and checked numbers so hope this is accurate, but more eyes are always a good idea. Also please see my comments and let me know what you think about dropping some of these slides. – j. -

Topics for AA Wehrum Meeting with Administrator Wheeler

March 8, 2019

1. RFS Small refinery exemptions (decisions needed as quickly as possible)

- EPA needs to make decisions as quickly as possible on how to proceed with petitions for small refinery exemptions currently before the agency. There are two groups:
 - 2017 petitions: 7 before EPA
 - 2018 petitions: 37 before EPA
- Timing
 - The compliance deadline for the RFS program falls on March 31 each year for the preceding calendar/compliance year, by regulation.
 - Ideally, small refineries petition at the end of the compliance year (Nov/Dec) and EPA issues decisions in Jan/Feb, one to two months in advance of the deadline.
 - Remaining 2017 petitions were received between May-December of 2018 well after the 2017 compliance deadline and after a letter was received from Senator Grassley and 11 other Senators asking EPA to cease issuing decisions.

Ex. 5 Deliberative Process (DP)

- What happens if we do not issue remaining 2017 decisions now?
 - All seven petitioners have already complied for 2017 using primarily 2017 RINs and up to 20% 2016 RINs, and sought relief after the compliance deadline.
 - At the end of this month those RINs expire and may not be used for compliance going forward (i.e., they will cease to have value)
- **Ex. 5 Deliberative Process (DP)**
 - If we grant relief, the companies will have a few days to try to sell those expiring 2017 RINs to other parties to retire for compliance.
 - After this month, granting an exemption would provide no meaningful relief.
- What happens if we do not issue the 2018 decisions now?
 - At this point, it is not possible for DOE to score and EPA to issue all 2018 petitions by the end of this month.
 - Refiners that do not receive a decision now, will likely choose to carry a deficit for the 2018 compliance year allowing the obligation to be met March 31, 2020.
 - They could choose to comply now and if they get relief, we would refund the RINs.
- Options for decisions going forward (a more detailed briefing is available)

Ex. 5 Deliberative Process (DP)

Deliberative/Pre-decisional

Ex. 5 Deliberative Process (DP)

Deliberative/Pre-decisional

Message

From: Hengst, Benjamin [Hengst.Benjamin@epa.gov]
Sent: 3/13/2019 10:38:34 PM
To: Bunker, Byron [bunker.byron@epa.gov]; Le, Madison [Le.Madison@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]; Manners, Mary [manners.mary@epa.gov]; Stahle, Susan [Stahle.Susan@epa.gov]; Dubey, Susmita [dubey.susmita@epa.gov]; Birgfeld, Erin [Birgfeld.Erin@epa.gov]; Nelson, Karen [nelson.karen@epa.gov]
Subject: Fwd: Updated plan for tomorrow on SREs
Attachments: ajdrev_Remaining 2017 SREs Roll out and Desk Statement march 13 2019 455pm.docx; ATT00001.htm

Begin forwarded message:

From: "Dominguez, Alexander" <dominguez.alexander@epa.gov>
Date: March 13, 2019 at 6:35:18 PM EDT
To: "Hengst, Benjamin" <Hengst.Benjamin@epa.gov>, "Wehrum, Bill" <Wehrum.Bill@epa.gov>, "Woods, Clint" <woods.clint@epa.gov>
Cc: "Lewis, Josh" <Lewis.Josh@epa.gov>, "Grundler, Christopher" <grundler.christopher@epa.gov>
Subject: RE: Updated plan for tomorrow on SREs

A few suggestions from Clint and I. We will make sure Bill has a hardcopy in the morning in case there are additional edits needed to desk statement and press inquiries.

From: Hengst, Benjamin
Sent: Wednesday, March 13, 2019 5:03 PM
To: Dominguez, Alexander <dominguez.alexander@epa.gov>; Wehrum, Bill <Wehrum.Bill@epa.gov>; Woods, Clint <woods.clint@epa.gov>
Cc: Lewis, Josh <Lewis.Josh@epa.gov>; Grundler, Christopher <grundler.christopher@epa.gov>
Subject: Updated plan for tomorrow on SREs

Following confirmation that the Administrator OK'd the plan for tomorrow, I'm sharing a slightly updated version of the roll-out plan, just as an FYI. Enviroflash will go out tomorrow at 8:30 am; web will be updated at 2pm. We have shared docs with coms so they are prepared.

Thanks,
Ben

Message

From: Hengst, Benjamin [Hengst.Benjamin@epa.gov]
Sent: 3/13/2019 8:57:53 PM
To: Birgfeld, Erin [Birgfeld.Erin@epa.gov]; Mylan, Christopher [Mylan.Christopher@epa.gov]; Bunker, Byron [bunker.byron@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]; Nelson, Karen [nelson.karen@epa.gov]; McKenna, Chris [McKenna.Chris@epa.gov]; Spencer, Mark [spencer.mark@epa.gov]; Le, Madison [Le.Madison@epa.gov]; Weihrauch, John [Weihrauch.John@epa.gov]; Parsons, Nick [Parsons.Nick@epa.gov]; Larson, Ben [Larson.Ben@epa.gov]; Kim, Jung [Kim.Jung@epa.gov]; Dubey, Susmita [dubey.susmita@epa.gov]; Stahle, Susan [Stahle.Susan@epa.gov]; Orlin, David [Orlin.David@epa.gov]; Mroz, Jessica [mroz.jessica@epa.gov]
Subject: RE: The latest on tomorrow's 2017 SRE announcements
Attachments: Remaining 2017 SREs, Roll out and Desk Statement, march 13 2019 455pm.docx

Current version of roll-out attached. If you have further edits or thoughts, please email me your edits directly.

Erin—please share with coms/OPA.

Jessie—please share with OCIR.

Thanks
 Ben

From: Hengst, Benjamin
Sent: Wednesday, March 13, 2019 3:41 PM
To: Birgfeld, Erin <Birgfeld.Erin@epa.gov>; Christopher Mylan (Mylan.Christopher@epa.gov) <Mylan.Christopher@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Janet Cohen (cohen.janet@epa.gov) <cohen.janet@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; McKenna, Chris <mckenna.chris@epa.gov>; Spencer, Mark <spencer.mark@epa.gov>; Le, Madison <Le.Madison@epa.gov>; 'Weihrauch, John' <weihrauch.john@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>; Kim, Jung <Kim.Jung@epa.gov>; Dubey, Susmita <dubey.susmita@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Orlin, David <Orlin.David@epa.gov>; 'Jessica Mroz (mroz.jessica@epa.gov)' <mroz.jessica@epa.gov>; Machiele, Paul <machiele.paul@epa.gov>; Dallas Burkholder (burkholder.dallas@epa.gov) <burkholder.dallas@epa.gov>; William Charmley (charmley.william@epa.gov) <charmley.william@epa.gov>; Meekins, Tanya <Meekins.Tanya@epa.gov>
Subject: The latest on tomorrow's 2017 SRE announcements

All—

Just spoke with Clint Woods (Bill W is out). Clint just returned from a meeting with Administrator Wheeler, who said the 2017 SRE web update/decision document issuance **should happen tomorrow**. So we are sticking with Plan A.

I confirmed that Wheeler himself gave the OK (Clint said he handed the Administrator the written plan and Wheeler OK'd it). So—we are on for tomorrow.

Jessie—can you please contact Karen T in OCIR and let her know the plan? You can tell her we will send her the desk statement when finalized. Give me a call if you have questions about this.

John W—please confirm that you have what you need to hit 'send' on the Enviroflash at 8:30 am. This is the final text for the message

At 2:00 pm today, March 14, 2019, EPA will simultaneously issue additional decision documents to small refineries that petitioned for a 2017 exemption, and update the Renewable Fuel Standard Small Refinery Exemption [website](#) to reflect that information.

I will circulate final desk statement language sometime tomorrow, prior to the 2pm update.

Thanks,
Ben

From: Hengst, Benjamin
Sent: Wednesday, March 13, 2019 10:56 AM
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Subject: 3/14 SRE update: please review this doc

All—here is the current version of the Plan for tomorrow. Please review and circulate edits to this group—I will keep the pen on this for now and will incorporate edits. Please edit by 1pm.

The more I think about it, the more I like Byron's suggestion of issuing the letters at 3:14pm in honor of the date, but I think we will just stick with 2pm.

Thanks,
Ben

ORAL ARGUMENT NOT YET SCHEDULED
CASE NO. 18-1202

IN THE
**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PRODUCERS OF RENEWABLES UNITED FOR
INTEGRITY TRUTH AND TRANSPARENCY,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON PETITION FOR REVIEW FROM THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

**ADDENDUM TO INITIAL OPENING BRIEF OF
PETITIONER**

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United for Integrity Truth and
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Dated: February 1, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PRODUCERS OF RENEWABLES
UNITED FOR INTEGRITY TRUTH
AND TRANSPARENCY,

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v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

Case No. 18-1202

DECLARATION OF COLLIN CAIN

I, Collin Cain, hereby attest as follows:

1. I am over 21 years of age and competent to make this declaration.
2. I am a Principal in the Energy Practice of Bates White Economic Consulting, a firm with over 200 degreed professionals in economics, finance and engineering. My business address is 2001 K Street, N.W., North Building Suite 500, Washington, DC 20006. I submit this Declaration to support the Motion for Stay of Agency Action Pending Review and/or to Expedite filed by Petitioner in the above-captioned case.
3. I am a member of Bates White's Energy Practice. I have more than 20 years' experience in the energy industry, providing expert testimony, advisory and

analytical services to clients in the renewable fuels industry, regulatory agencies, and other business entities involved in the energy sector. Over the past six years, I have examined various issues related to the Renewable Fuel Standard (“RFS”) program, the production capability and cost trends of the biodiesel industry, the pricing of Renewable Identification Number (“RIN”) credits, and the cost effectiveness of biodiesel as a means of reducing CO2 emissions.

BACKGROUND

4. The Renewable Fuel Standard (“RFS”) program was created under the Energy Policy Act of 2005 (“EPACT”), and expanded under the Energy Independence and Security Act of 2007 (“EISA”). The program is implemented by the Environmental Protection Agency (“EPA”), pursuant to statutes established within the Clean Air Act (“CAA”). The RFS program requires that certain amounts of renewable fuel, with volumes specified for each year, be used to replace quantities of petroleum-based transportation fuel, heating oil, and jet fuel. The replacement of petroleum-based fuels – gasoline and diesel fuel – primarily occurs through the blending of renewable fuels with their petroleum-based counterparts. Ethanol is blended with gasoline, and biodiesel is blended with petroleum diesel, for use by end-consumers.

5. The EISA, which amended the RFS program, stated an intent “[t]o move the United States toward greater energy independence and security, to

increase the production of clean renewable fuels....” Pub. L. No. 110–140, 121 Stat. 1492 (2007). As codified, and as implemented since enacted, the RFS program achieves the intent to increase the production of renewable fuels by creating minimum demand levels for renewable fuels. The minimum volumes establish demand certainty for the biofuels industry, thereby supporting investment in production capacity as well as technological advances that increase efficiency and lower costs.

6. The RFS establishes four renewable fuel categories: biomass-based diesel, cellulosic biofuel, advanced biofuel, and total renewable fuel, which are distinguished by the degree to which the renewable fuel reduces greenhouse gas (“GHG”) emissions and the type of feedstock used to produce the fuel. EPA is required to set standards for each fuel category annually, in advance of the compliance year, based on statutory targets, and has the authority to set volumes that deviate from the statutory minimum levels if it is determined that domestic supply is inadequate, or that the statutory levels would cause severe economic or environmental harm.

7. The CAA requires EPA to announce each year’s volume standards by November 30 of the previous year, except for biomass-based diesel volumes, which must be announced 14 months before the compliance year. EPA sets a Renewable Volume Obligation (“RVO”) for each fuel, which is converted to a percentage of

projected gasoline and diesel production for the coming year. Obligated parties, which are refiners or importers of gasoline or diesel fuel, must demonstrate that they have complied with their RVO requirements based on the specified percentage share of the petroleum fuels they have produced or imported. This methodology is significant to the harm addressed in Petitioner's Motion because EPA does not alter the overall RVO percentage requirements to account for the small refinery exemptions it has allowed, which causes a reduction in the compliance volumes EPA has set pursuant to statute, as discussed further, below.

8. Obligated parties demonstrate compliance through the retirement of RINs associated with the respective fuel categories. RINs are distinguished by a "D-code" for each fuel category: D3 for cellulosic biofuel, D4 for biodiesel, D5 for advanced biofuel, D6 for conventional biofuel, and D7 for cellulosic diesel. RINs are created for each gallon of biofuel physically produced (or imported), and are "attached" to the corresponding volumes. RINs follow the ownership of the physical fuel volumes when title is transferred to obligated parties and other non-obligated fuel blenders. Obligated parties or blenders may then separate the RINs from the physical fuel volumes, and the RINs can then be traded separately and used by an obligated party purchasing the RINs to demonstrate compliance with the RVO requirement without blending the physical fuel. For example, one entity may purchase and blend renewable fuel in excess of its RVO obligation, and sell

separated RINs to other obligated parties. The price at which the RINs trade can make this a valuable transaction for both parties, such that overall compliance costs are minimized, while overall RVO requirements are met.

9. RIN trading establishes the value of each RIN type, and this value both reflects the support for renewable fuel production provided by the RFS program and is the means by which renewable fuel producers can realize that support financially. Several examples illustrate how the mechanism operates. One, a biofuel producer may sell renewable fuel to an obligated party that then blends the renewable fuel into petroleum-based fuel and retires the attached RINs to demonstrate compliance with its RVO requirement. The price at which the biofuel producer sells the renewable fuel is expected to reflect the cost of renewable fuel production. Two, a biofuel producer may sell renewable fuel to a non-obligated party, such as a fuel retailer, that blends the fuel and sells separated RINs to obligated parties. The value of the RINs when sold lowers the overall cost of fuel to the retailer. Three, a biofuel producer may sell renewable fuel to a non-obligated party at the market price of petroleum-based fuel; the purchaser then separates the RINs and transfers them back to the producer, which sells the RINs to obligated parties, generating revenue to cover the cost of renewable fuel production above the fuel sale price. This latter type of transaction is increasingly common, and constitutes a transfer of financial risk associated with traded RIN value back to the biofuel producer.

10. Separated RINs provide a flexible means for obligated parties to demonstrate compliance and for biofuel producers to monetize the support provided under the RFS program, but it is the RVO *volumes* established by the EPA that ultimately determine the support for investment in production capacity and technological improvements to increase renewable fuel production, as intended under the CAA statute. In particular, it is the certainty of the minimum renewable fuel demand established by the RVOs that allows companies to finance and undertake the substantial up-front investments required to create and maintain renewable fuel production capability.

EPA's ACTIONS AND IMPACTS

I. EPA's recent small refinery exemptions represent a significant change in agency practice

11. Congress provided a "temporary exemption" from the RFS volume requirements for "small refineries," through compliance year 2010.^{1,2} Based on the results of a study to determine whether compliance would "impose a disproportionate economic hardship on small refineries," EPA was granted

¹ 42 U.S.C. §7545(o)(9).

² A small refinery is defined as "a refinery for which the average aggregate daily crude oil throughput for a calendar year ... does not exceed 75,000 barrels." §7545(o)(1)(K)

authority to extend this temporary exemption for two years.³ Beginning with the 2013 compliance year, small refineries were allowed to petition EPA for a further extension of the exemption “for the reason of disproportionate economic hardship.”⁴ EPA was required to evaluate any such petitions considering the results of the initial study that examined potential economic hardship for small refiners, and other economic factors.⁵ EPA granted 8 exemptions for 2013, 8 exemptions in 2014, and 7 exemptions for 2015.⁶

12. Earlier this year, a series of press reports revealed the apparent expansion of the small refinery exemptions by EPA.⁷ These included reports that

³ *Id.*

⁴ 42 U.S.C. §7545(o)(9).

⁵ *Id.*

⁶ EPA, <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions>, Table 2, Summary of Small Refinery Exemption Decisions Each Compliance Year.

⁷ These reports include: Jennifer A. Dlouhy, *et al.*, *EPA Waiving Biofuel Quotas Spurs Rebuke From Ethanol Supporters*, Bloomberg, Apr. 4, 2018, <https://www.bloomberg.com/news/articles/2018-04-04/epa-waiving-biofuel-quotas-spurs-rebuke-from-ethanol-supporters>; Jarrett Renshaw and Chris Prentice, *U.S. ethanol groups bristle as EPA frees refiners from biofuels law*, Reuters, Apr. 4, 2018, <https://www.reuters.com/article/us-usa-biofuels-epa-refineries/u-s-epa-grants-25-small-refineries-relief-from-biofuels-law-source-idUSKCN1HB2AH>; Jarrett Renshaw, *U.S. EPA grants 25 small refineries relief from biofuels law – source*, Reuters, Apr. 4, 2018, <https://www.reuters.com/article/usa-biofuels-epa-refineries/u-s-epa-grants-25-small-refineries-relief-from-biofuels-law-source-idUSL2N1RH106>; Jarrett Renshaw and Chris Prentice, *Exclusive: Chevron, Exxon seek ‘small refinery’ waivers from U.S. biofuels law*, Reuters, Apr. 12, 2018, <https://www.reuters.com/article/us-usa-biofuels-epa-refineries-exclusive/exclusive-chevron-exxon-seek-small-refinery-waivers-from-u-s-biofuels-law->

EPA retroactively granted exemptions to refineries owned and operated by HollyFrontier Corporation⁸ and Sinclair Oil Corporation⁹ and allowed them to generate 2018 RINs.¹⁰

13. EPA subsequently posted to its web site the number of exemptions it had granted, and the associated petroleum fuel and renewable fuel volumes, demonstrating the radical departure from prior agency actions. Granted exemptions jumped from 7 in 2015, with 6 denials, to 19 and 29 exemptions in 2016 and 2017, respectively, with zero denials. The EPA provided no explanation for why its

idUSKBN1HJ32R; Jarrett Renshaw and Chris Prentice, *Exclusive: U.S. EPA grants biofuels waiver to billionaire Icahn's oil refinery – sources*, Reuters, Apr. 30, 2018, <https://www.reuters.com/article/us-usa-biofuels-epa-icahn-exclusive/exclusive-u-s-epa-grants-biofuels-waiver-to-billionaire-icahns-oil-refinery-sources-idUSKBN1HJ32R>; Jarrett Renshaw and Chris Prentice, *Exclusive – U.S. refining giant Marathon seeks EPA biofuel waiver – sources*, Reuters, May 23, 2018, <https://www.reuters.com/article/us-usa-biofuels-marathon-pete-exclusive/exclusive-u-s-refining-giant-marathon-seeks-epa-biofuel-waiver-sources-idUSKCN1H0118>.

⁸ Upon information and belief, the refineries at issue are owned and operated by HollyFrontier Refining & Marketing LLC and HollyFrontier Cheyenne Refining LLC, which are wholly owned subsidiaries of HollyFrontier Corporation (referred to as HollyFrontier).

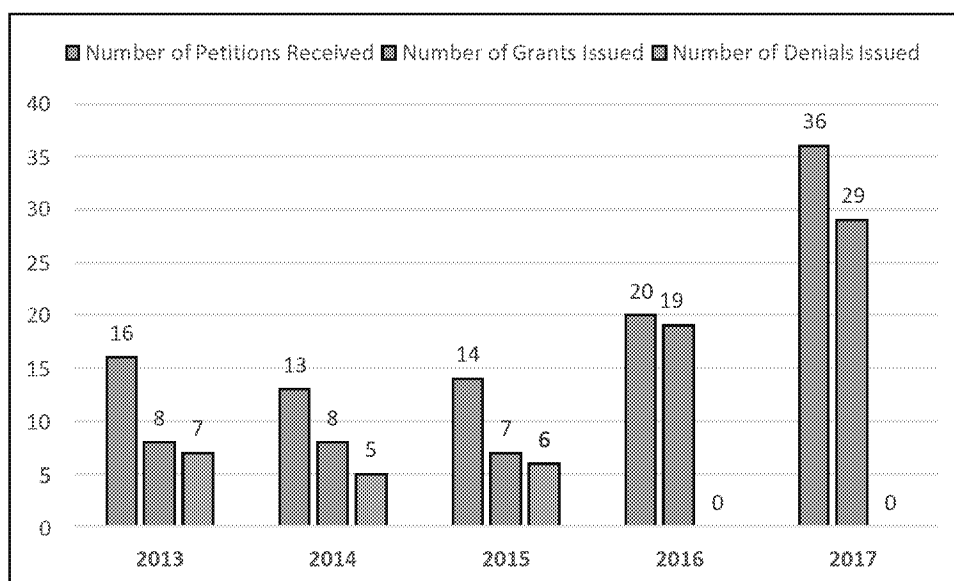
⁹ Upon information and belief, the refineries at issue are owned and operated by Sinclair Wyoming Refining Company and Sinclair Casper Refining Company, which are wholly owned subsidiaries of Sinclair Oil Corporation (referred to as Sinclair).

¹⁰ See Dan Macy, *EPA's Grant of 2018 RIN Credits to Two Refiners Riles Biofuels Industry*, OPIS, June 1, 2018.

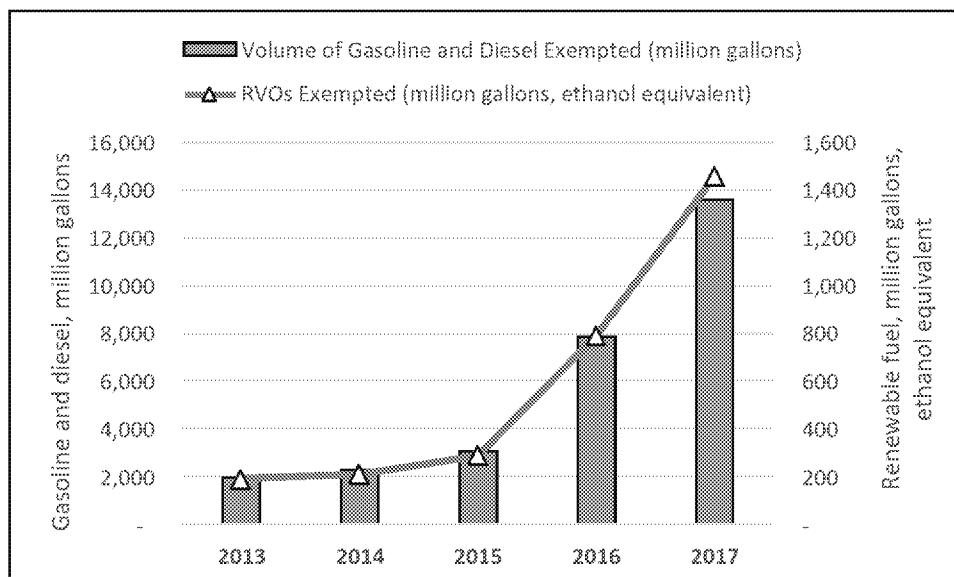
actions had changed abruptly and no information on which refiners had received exemptions.

14. Figure 1 shows the number of exemptions granted by compliance year from 2013 through 2017. Figure 2 shows the associated volumes of gasoline and diesel exempted from the obligation to blend renewable fuel, and the RVO volume of renewable fuel for the same years. The renewable fuel volumes are expressed in millions of ethanol-equivalent gallons, which is equivalent to the number of RINs.

Figure 1: Small Refinery Exemptions 2013-2017¹¹



¹¹ EPA, <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions>, Table 2, Summary of Small Refinery Exemption Decisions Each Compliance Year.

Figure 2: Exempted Volumes of Gasoline, Diesel and Renewable Fuel RVOs¹²

15. In an August 7, 2018 letter to Representative Loeb sack, EPA stated that it was still processing 5 petitions for exemptions for the 2017 compliance year.¹³ The number is now 7, according to the most recent data posted to EPA's website (last updated October 10, 2018).¹⁴ The letter also stated that EPA had received 2 petitions for exemptions for the 2018 compliance year, while the data on EPA's website indicates that 15 petitions for exemption for 2018 are now pending. EPA's website indicates that 1 petition remains pending for the 2016 compliance year.

¹² EPA, <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions>, Table 1, Exempted Volume of Gasoline and Diesel Each Compliance Year.

¹³ EPA letter to the Honorable Dave Loeb sack, August 7, 2018.

https://loeb sack.house.gov/uploadedfiles/8.7.18_epa_sres_under_rfs.pdf

¹⁴ <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions>.

16. As I discuss in the next section of my Declaration, the sharp increase in exemptions provided by EPA has caused significant decreases in the renewable fuel volume obligations that EPA had set in advance of each compliance year, which are the minimum volumes that the biofuels industry relies on when making investment and operating decisions. The fact that EPA is providing exemptions after the conclusion of the compliance year exacerbates the uncertainty created by the opaque process EPA is applying in reviewing and granting exemptions. EPA has provided little, if any, information with which to assess whether and how its actions are supported, or whether they are indiscriminate.

17. Disruption from EPA's grant of retroactive exemptions carries forward to the current market in two ways. First, any RINs that had been acquired for the compliance year, but have not yet expired or been retired, will be sold by the exempt refinery to remaining obligated parties, reducing the net demand for renewable fuel / RINs in the current year. RINs generated in one year may be used for compliance in that year, or the following year, after which they expire.

18. Second, and even more disruptive to the renewable fuels market, EPA has allowed exempted refineries to "generate" RINs as compensation for compliance in periods more than a year in the past. In a 10-Q filing on May 2, 2018, HollyFrontier Corp reported, "[i]n the first quarter of 2018, the EPA allowed us to generate new 2018 vintage RINs to replace the RINs previously submitted to meet

the Cheyenne Refinery's 2015 RVO."¹⁵ Renewable fuel volume requirements in 2018 are consequently being reduced not only by exemptions of obligations in the current year, but also by at least one exemption for a compliance year three years in the past.

II. EPA's actions have reduced renewable fuel obligation volumes below the RVOs established in EPA's own final rules

19. Statute requires that EPA establish the minimum volume requirements for each renewable fuel category in advance of the compliance year. Renewable fuel producers rely on these initial obligation volumes as the minimum demand the industry can count on for each compliance year. Producers make investment and operating decisions on the basis of the volume obligations, which is exactly the intent of the RFS program – to provide demand certainty for producers.

20. What is directly relevant for obligated parties are the renewable fuel obligations expressed as a percentage of gasoline and diesel fuel. EPA calculates this as the renewable fuel volume obligation for each fuel category divided by the estimated volumes of gasoline and diesel fuel for the compliance year. Each obligated party must demonstrate compliance based on the percentage RVOs applied against the total petroleum fuel volumes they produce, blend or import. The RVO

¹⁵ Hollyfrontier Corporation 10-Q, October 31, 2018. Accessed at: <http://investor.hollyfrontier.com/static-files/f2fceda2-3cfd-4c46-a4b2-3c31e1b5784c>.

percentages applied for each obligated party individually sum to the total renewable fuel obligation that EPA determined initially.¹⁶

21. Table 1 shows how EPA determined the RVO percentages for renewable fuel for compliance years 2016 and 2017.

Table 1: Determination of RVO Compliance Percentages, 2015-2017

Compliance Year	Renewable Fuel Obligation (mm gal.)	Projected Gasoline and Diesel Volumes (mm gal.)	Final Rule Renewable Fuel RVO %
	(a)	(b)	(c) = (a)/(b)
2015	16,930	177,860	9.52%
2016	18,110	179,320	10.10%
2017	19,280	180,130	10.70%

22. EPA's bare reporting on its expanded exemptions includes the exempted volumes of gasoline and diesel, and the associated reduction in renewable fuel volumes, which is simply the gasoline and diesel volume for the exempted refineries multiplied by the renewable fuel RVO percentage applicable for each year.¹⁷ The RVO percentage applicable to all other obligated parties is unchanged, so the exempted volumes are not made up elsewhere, and the exemptions cause the renewable fuel obligation established by final rule to shrink. Table 2 shows the

¹⁶ At the end of the compliance year, the total volume of renewable fuel blended may differ from initial volume obligation to the extent that the actual petroleum fuels volume differs from EPA's advance estimate.

¹⁷ In actuality, EPA has not even provided the basis for the exempted volumes of gasoline and diesel it reports. For instance, it is not clear that these values correspond to the *actual* output of these fuels by the refineries receiving the exemptions.

growing impact on renewable fuel obligations from the sharp expansion of exemptions granted by EPA. For the 2017 compliance year, exemptions reduced the final rule renewable fuel obligation by more than 7 percent.

Table 2: Reduction in Renewable Fuel Obligation Caused by Exemptions, 2015-2017

Compliance Year	Exempt gasoline and diesel (mm gal.)	Final Rule Renewable Fuel RVO %	Reduction in Renewable Fuel Obligation (mm gal.)	Renewable Fuel Obligation (mm gal.)	Percent Reduction in Renewable Fuel Obligation
	(a)	(b)	(c) = (a) x (b)	(d)	(e) = -(c)/(d)
2015	3,070	9.52%	292	16,932	-1.7%
2016	7,840	10.10%	792	18,111	-4.4%
2017	13,620	10.70%	1,457	19,274	-7.6%

* In EPA's reporting, these values are rounded to the nearest 10 million gallons or RINs.

23. EPA's abrupt expansion of small refinery exemptions, granted after the renewable fuel volumes had been set, and in some, if not all, cases after the compliance period had ended, has reduced the renewable fuel volume obligations that biofuel producers had relied upon to plan and invest. Like any business enterprise that requires substantial capital investment, biofuel producers must seek financing by convincing investors and lenders that a reliable market for their product exists. The RFS program is intended to support investments in renewable fuel production capacity, and in the development of improved technology, by providing certainty in the market for biofuels looking forward. Based on the market confidence provided by RFS, biofuel producers are able to make investment plans, secure

financing, and make forward commitments to equipment and feedstock suppliers, employees, and customers. EPA's recent actions on small refinery exemptions undermine the certainty and transparency of EPA's implementation of the RFS program, which are essential to providing the support to the biofuels industry intended by Congress.

III. The sharp increase in granted exemptions, including retroactive exemptions, has disrupted the market for RINs, undermining a key RFS support mechanism

24. Because RINs are separable and tradable credits, they are not simply a method to document compliance, but provide a simple, flexible and transparent means for biofuel producers to facilitate trades and to translate the demand support from the RFS program into financial support. RIN prices visible in the market provide important information to both buyers and sellers of biofuels. When the RFS program is being administered transparently, RIN prices are an essential indicator of the current state of biofuels supply and demand. Separated and traded RINs are an alternative method of compliance, so buyers and sellers use visible RIN prices as a reference when negotiating physical transactions. RIN prices encapsulate information about the market and thereby expand the information available to all market participants. The economic efficiency of the RFS program is improved by

traded RINs because obligated parties can more easily identify the least cost methods of compliance.

25. Biofuel producers typically enter into forward contracts based on a variety of projected factors, including expected production costs (based on prices of feedstocks and other inputs), forecasted petroleum fuel prices, and RIN price trends. As noted above, it has become increasingly common for producers to sell biofuels indexed to the market price of petroleum fuel, and then to receive separated RINs back from the buyer. Biofuels producers are therefore increasingly exposed to RIN price risk. This risk is magnified because RIN transactions generally achieve better pricing when RINs are sold in blocks. That is, RIN owners will typically wait to sell RINs until they have a sufficient number to garner interest from buyers.

26. EPA's actions on small refinery exemptions have caused RIN prices to drop and the volatility of RIN prices to rise, reflecting both the reduction in obligation volumes, and also the uncertainty caused by EPA's complete lack of transparency. As far as the market is concerned, the small refinery exemptions cannot be predicted, and each piece of new information about exemptions causes an immediate shock to the RIN market, which then propagates to the physical biofuels market.

27. On January 25, 2018, Reuters reported that EPA was reviewing 27 applications from small refineries to waive their RFS obligations. "More refiners

had applied this year than usual,” the report stated, “emboldened by the Trump administration’s anti-regulatory stance.”¹⁸ Reuters also noted the effect of its report on RIN markets, writing that “[p]rices of the most popular renewable fuel credits dropped to 61 cents in early trading on Thursday,” (the day of the report), which was “a near eight-month low and down from 64 cents on Wednesday.”¹⁹

28. On April 3, 2018, Reuters issued an “exclusive” report that EPA had granted RFS exemptions to three small refineries owned by Andeavor, one of the largest U.S. refining companies – a company that posted net profits of \$1.5 billion in 2017. The report stated that EPA’s action “raises the question of whether other big and profitable oil firms with small refineries... also have or could receive the waivers, which are granted by the EPA in secret.”²⁰ Reuters updated its posted item to report that D6 RIN prices had fallen 6 cents (more than 13%), following the initial report.²¹

¹⁸ Reuters, “Exclusive: U.S. small refiners make surge of biofuel waiver requests - sources,” January 25, 2018. <https://www.reuters.com/article/us-usa-epa-biofuels-exclusive/exclusive-u-s-small-refiners-make-surge-of-biofuel-waiver-requests-sources-idUSKBN1FE1KA>

¹⁹ *Id.*

²⁰ Reuters, “Exclusive: EPA gives giant refiner a 'hardship' waiver from regulation,” April 3, 2018. <https://www.reuters.com/article/us-usa-biofuels-epa-refineries-exclusive/exclusive-epa-gives-giant-refiner-a-hardship-waiver-from-regulation-idUSKCN1HA21P>

²¹ *Id.*

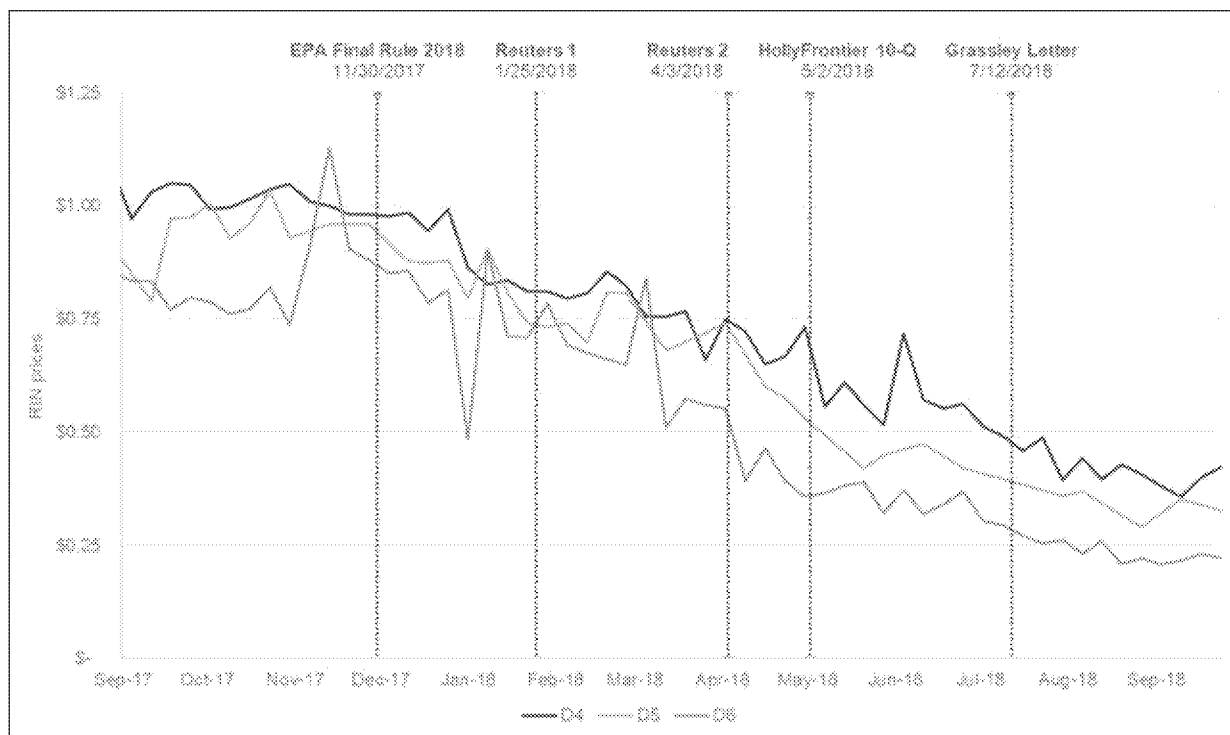
29. On July 12, 2018, EPA sent a letter to Senator Grassley in response to queries from his office. In the letter, EPA provided data, which it would later post to its website, on the number of exemptions it had granted for compliance years 2016 and 2017, and the associated volume of RINs.²² These data correspond to the values presented for the respective years in Figure 1 and Figure 2, above.

30. Figure 3 shows the progress of D4, D5 and D6 RIN prices over the past year, with indication of the timing of each of the exemption-related events summarized above. The RIN price data are weekly values provided by EPA, not daily prices, which are not available publicly. As a result, the chart does not show detail on the particular daily price movements documented above. Nonetheless, the continued price decline and volatility are evident.

²² Letter from EPA to Senator Grassley, July 12, 2018.

<https://www.grassley.senate.gov/sites/default/files/Signed%20Letter%20to%20The%20Honorable%20Charles%20E.%20Grassley.pdf>

Figure 3: RIN Prices and Information Events Related to EPA Small refinery exemptions



31. The sustained fall in RIN prices and increased price volatility, caused by the progressive revelations of EPA's actions on small refinery exemptions, and particularly the fact that EPA has been granting exemptions retroactively, represent substantial disruptions to the biofuel industry. Biofuel producers enter forward fuel sale contracts that may span several months. They do this based on projections of production costs, petroleum fuel prices, and RIN prices. They may not be able to realize the value of RINs for a significant time after the fuel is produced and the RINs are generated. In part this is because of the delay between production and the

return of the RINs after they have been separated by the buyer. In part it is because RINs cannot be sold easily in small numbers, so there may be an additional delay while a sufficient number of RINs is assembled. The repeated downward shocks to RIN prices over the past year undermine potential product sales, which depend on the RIN value to create a transaction margin for both buyer and seller. Those shocks also harm producers holding RINs from past transactions. Sales that were projected to provide adequate revenue may no longer cover costs.

32. EPA's complete lack of transparency regarding its actions, evaluation criteria (if any), and intended future actions, make it impossible for biofuel producers to predict the actual biofuel demand they will face going forward, hamstringing the ability of producers to plan their operations, justify investments, and secure financing. The prospect of continued suppression of RIN prices caused by exemptions, and price shocks caused by surprise information on EPA actions, can be expected to further stress the biofuel industry, and may lead some producers to close production facilities. That is a predictable result of falling demand, reduced product prices, and increased business risk, and is exactly the reverse of what Congress intended when it established the RFS program.

33. Moreover, EPA has declined to correct the adverse impacts of its exemption actions going forward. While EPA's exemption actions over the past two years have caused a substantial reduction in obligation volumes, as documented

above, EPA has refused to consider exemptions in setting RFS renewable fuel volumes for future compliance years. EPA's proposed rule to set RFS volumes for 2019 and biodiesel volumes for 2020, published on July 10, 2018, states that:

EPA is maintaining its approach that any exemptions for 2019 that are granted after the final rule is released will not be reflected in the percentage standards that apply to all gasoline and diesel produced or imported in 2019. EPA is not soliciting comments on how small refinery exemptions are accounted for in the percentage standards formulas in 40 CFR 80.1405, and any such comments will be deemed beyond the scope of this rulemaking.²³

34. This effectively ensures that the RFS program will not achieve its statutory intent to increase the production of renewable fuels by creating demand certainty for biofuels producers. EPA's actions will impose continued disruption on the biofuels industry, reduced biofuel production, and a likely reduction in production capacity going forward.

IV. The reduction in biofuel obligation volumes caused by EPA's exemption actions will harm the environment

35. By reducing renewable fuel obligations, EPA's exemption actions will result in increased pollutant emissions. In work over the past six years, I have examined the value of the RFS program in reducing CO₂ emissions from

²³ EPA, Proposed Rule, *Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020*, at 32057. <https://www.gpo.gov/fdsys/pkg/FR-2018-07-10/pdf/2018-14448.pdf>

transportation, with a focus on the contribution of biodiesel in displacing emissions from petroleum diesel. In 2017, CO₂ emissions by the transportation sector exceeded those of the electric power sector in the U.S. for the first time, accounting for 1,902 million metric tons of emitted CO₂, 37% of the U.S. total.²⁴ While emissions from the power sector have been reduced by the shift away from coal-fired generation toward emission-free renewables and less-carbon intensive natural gas-fired generation, transportation emissions reached an all-time high in 2017.

36. Biofuels reduce CO₂ emissions relative to petroleum-based fuels because they are less carbon-intensive. Biofuels are derived ultimately from organic sources that have recently pulled CO₂ out of the atmosphere. As a consequence, emissions from biofuels cause a comparatively small net contribution to atmospheric CO₂. Emissions from petroleum-based fuels, in contrast, represent a pure net addition of CO₂ to the atmosphere.²⁵ The RFS program requires that biofuels displace a portion of petroleum-based fuels in transportation, thereby reducing net CO₂ emissions.

37. EPA has reported the effect of recent small refinery exemptions on the volume of renewable fuel (expressed in millions of RINs), which encompasses

²⁴ EIA, <https://www.eia.gov/tools/faqs/faq.php?id=75&t=11>

²⁵ The carbon in fossil fuels derives from atmospheric CO₂ fixed by plants many millions of years in the past.

conventional ethanol as well as advanced biofuels, including biodiesel. The reduction in biodiesel volumes can be derived from EPA's data by first replacing the renewable fuel RVO percentage in Table 2, above, with the applicable advanced biofuel RVO percentage. The RVO percentage for biodiesel alone would understate the reduction in biodiesel, because biodiesel meets part of the broader advanced biofuel volume. Based on EPA data on RIN retirements by fuel type, biodiesel comprised 90% of the total advanced fuel category in both 2016 and 2017. Because the renewable fuel and advanced fuel volumes are expressed in ethanol-equivalent gallons, a further adjustment is required to reflect the fact that biodiesel generates 1.5 RINs per gallon because of its higher energy content. Table 3 shows the derivation of the reduction in biodiesel volumes resulting from the small refinery exemptions. The total reduction in biodiesel for 2016 and 2017 is 289 million gallons.

Table 3: Reduction in Biodiesel from Small Refinery Exemptions

Compliance Year	Exempt gasoline and diesel (mm gal.)	Final Rule Advanced Biofuel RVO %	Reduction in Advanced Biofuel Obligation (mm gal.)	Reduction in Biodiesel (mm ethanol-equivalent gallons)	Reduction in Biodiesel (mm gallons)
	(a)	(b)	(c) = (a) x (b)	(d) = (c) x 90%	(e) = (d)/1.5
2016	7,840	2.01%	158	142	95
2017	13,620	2.38%	324	292	194

38. Based on the current shares of low carbon intensity feedstocks used in biodiesel production – such as waste greases, animal fats, and distillers corn oil –

biodiesel currently reduces CO2 emissions by 81% relative to petroleum diesel. This means that for every 100 gallons of biodiesel that is substituted for an equivalent amount of petroleum diesel, net CO2 emissions are reduced by one metric ton. By reducing biodiesel volumes by a combined 289 million gallons in 2016 and 2017, the small refinery exemptions will have caused CO2 emissions to *increase* by 2.9 million metric tons (2.9 mm MT = 289 mm gal. / 100 gal. per MT). This calculation of CO2 emissions effects excludes effects in 2018 from EPA's creation of 2018 RINs not tied to biodiesel production.

39. In addition to the impact on CO2 emissions, the reduced volumes of biodiesel will also cause an increase in diesel particulate emissions, which have been linked to a range of adverse human health consequences. Finally, the reduction in overall biofuel volumes caused the by the small refinery exemptions frustrates the intent of the RFS to promote U.S. energy independence and security.

40. This concludes my Declaration.

I declare under penalty of perjury that the foregoing
is true and correct to the best of my knowledge,
information, and belief.


2018

November 13,

Collin Cain

Date

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(4) Fuel dispensing systems

Any person selling oxygenated gasoline at retail pursuant to this subsection shall be required under regulations promulgated by the Administrator to label the fuel dispensing system with a notice that the gasoline is oxygenated and will reduce the carbon monoxide emissions from the motor vehicle.

(5) Guidelines for credit

The Administrator shall promulgate guidelines, within 9 months after November 15, 1990, allowing the use of marketable oxygen credits from gasolines during that portion of the year specified in paragraph (2) with higher oxygen content than required to offset the sale or use of gasoline with a lower oxygen content than required. No credits may be transferred between nonattainment areas.

(6) Attainment areas

Nothing in this subsection shall be interpreted as requiring an oxygenated gasoline program in an area which is in attainment for carbon monoxide, except that in a carbon monoxide nonattainment area which is redesignated as attainment for carbon monoxide, the requirements of this subsection shall remain in effect to the extent such program is necessary to maintain such standard thereafter in the area.

(7) Failure to attain CO standard

If the Administrator determines under section 7512(b)(2) of this title that the national primary ambient air quality standard for carbon monoxide has not been attained in a Serious Area by the applicable attainment date, the State shall submit a plan revision for the area within 9 months after the date of such determination. The plan revision shall provide that the minimum oxygen content of gasoline referred to in paragraph (2) shall be 3.1 percent by weight unless such requirement is waived in accordance with the provisions of this subsection.

(n) Prohibition on leaded gasoline for highway use

After December 31, 1995, it shall be unlawful for any person to sell, offer for sale, supply, offer for supply, dispense, transport, or introduce into commerce, for use as fuel in any motor vehicle (as defined in section 7554(2)⁸ of this title) any gasoline which contains lead or lead additives.

(o) Renewable fuel program**(1) Definitions**

In this section:

(A) Additional renewable fuel

The term “additional renewable fuel” means fuel that is produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in home heating oil or jet fuel.

(B) Advanced biofuel**(i) In general**

The term “advanced biofuel” means renewable fuel, other than ethanol derived

from corn starch, that has lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, that are at least 50 percent less than baseline lifecycle greenhouse gas emissions.

(ii) Inclusions

The types of fuels eligible for consideration as “advanced biofuel” may include any of the following:

(I) Ethanol derived from cellulose, hemicellulose, or lignin.

(II) Ethanol derived from sugar or starch (other than corn starch).

(III) Ethanol derived from waste material, including crop residue, other vegetative waste material, animal waste, and food waste and yard waste.

(IV) Biomass-based diesel.

(V) Biogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from renewable biomass.

(VI) Butanol or other alcohols produced through the conversion of organic matter from renewable biomass.

(VII) Other fuel derived from cellulosic biomass.

(C) Baseline lifecycle greenhouse gas emissions

The term “baseline lifecycle greenhouse gas emissions” means the average lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, for gasoline or diesel (whichever is being replaced by the renewable fuel) sold or distributed as transportation fuel in 2005.

(D) Biomass-based diesel

The term “biomass-based diesel” means renewable fuel that is biodiesel as defined in section 13220(f) of this title and that has lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, that are at least 50 percent less than the baseline lifecycle greenhouse gas emissions. Notwithstanding the preceding sentence, renewable fuel derived from co-processing biomass with a petroleum feedstock shall be advanced biofuel if it meets the requirements of subparagraph (B), but is not biomass-based diesel.

(E) Cellulosic biofuel

The term “cellulosic biofuel” means renewable fuel derived from any cellulose, hemicellulose, or lignin that is derived from renewable biomass and that has lifecycle greenhouse gas emissions, as determined by the Administrator, that are at least 60 percent less than the baseline lifecycle greenhouse gas emissions.

(F) Conventional biofuel

The term “conventional biofuel” means renewable fuel that is ethanol derived from corn starch.

(G) Greenhouse gas

The term “greenhouse gas” means carbon dioxide, hydrofluorocarbons, methane, ni-

⁸ So in original. Probably should be section “7550(2)”.

trous oxide, perfluorocarbons,⁹ sulfur hexafluoride. The Administrator may include any other anthropogenically-emitted gas that is determined by the Administrator, after notice and comment, to contribute to global warming.

(H) Lifecycle greenhouse gas emissions

The term “lifecycle greenhouse gas emissions” means the aggregate quantity of greenhouse gas emissions (including direct emissions and significant indirect emissions such as significant emissions from land use changes), as determined by the Administrator, related to the full fuel lifecycle, including all stages of fuel and feedstock production and distribution, from feedstock generation or extraction through the distribution and delivery and use of the finished fuel to the ultimate consumer, where the mass values for all greenhouse gases are adjusted to account for their relative global warming potential.

(I) Renewable biomass

The term “renewable biomass” means each of the following:

- (i) Planted crops and crop residue harvested from agricultural land cleared or cultivated at any time prior to December 19, 2007, that is either actively managed or fallow, and nonforested.
- (ii) Planted trees and tree residue from actively managed tree plantations on non-federal¹⁰ land cleared at any time prior to December 19, 2007, including land belonging to an Indian tribe or an Indian individual, that is held in trust by the United States or subject to a restriction against alienation imposed by the United States.
- (iii) Animal waste material and animal byproducts.
- (iv) Slash and pre-commercial thinnings that are from non-federal¹⁰ forestlands, including forestlands belonging to an Indian tribe or an Indian individual, that are held in trust by the United States or subject to a restriction against alienation imposed by the United States, but not forests or forestlands that are ecological communities with a global or State ranking of critically imperiled, imperiled, or rare pursuant to a State Natural Heritage Program, old growth forest, or late successional forest.
- (v) Biomass obtained from the immediate vicinity of buildings and other areas regularly occupied by people, or of public infrastructure, at risk from wildfire.
- (vi) Algae.
- (vii) Separated yard waste or food waste, including recycled cooking and trap grease.

(J) Renewable fuel

The term “renewable fuel” means fuel that is produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in a transportation fuel.

(K) Small refinery

The term “small refinery” means a refinery for which the average aggregate daily crude oil throughput for a calendar year (as determined by dividing the aggregate throughput for the calendar year by the number of days in the calendar year) does not exceed 75,000 barrels.

(L) Transportation fuel

The term “transportation fuel” means fuel for use in motor vehicles, motor vehicle engines, nonroad vehicles, or nonroad engines (except for ocean-going vessels).

(2) Renewable fuel program

(A) Regulations

(i) In general

Not later than 1 year after August 8, 2005, the Administrator shall promulgate regulations to ensure that gasoline sold or introduced into commerce in the United States (except in noncontiguous States or territories), on an annual average basis, contains the applicable volume of renewable fuel determined in accordance with subparagraph (B). Not later than 1 year after December 19, 2007, the Administrator shall revise the regulations under this paragraph to ensure that transportation fuel sold or introduced into commerce in the United States (except in noncontiguous States or territories), on an annual average basis, contains at least the applicable volume of renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel, determined in accordance with subparagraph (B) and, in the case of any such renewable fuel produced from new facilities that commence construction after December 19, 2007, achieves at least a 20 percent reduction in lifecycle greenhouse gas emissions compared to baseline lifecycle greenhouse gas emissions.

(ii) Noncontiguous State opt-in

(I) In general

On the petition of a noncontiguous State or territory, the Administrator may allow the renewable fuel program established under this subsection to apply in the noncontiguous State or territory at the same time or any time after the Administrator promulgates regulations under this subparagraph.

(II) Other actions

In carrying out this clause, the Administrator may—

- (aa) issue or revise regulations under this paragraph;
- (bb) establish applicable percentages under paragraph (3);
- (cc) provide for the generation of credits under paragraph (5); and
- (dd) take such other actions as are necessary to allow for the application of the renewable fuels program in a noncontiguous State or territory.

⁹ So in original. The word “and” probably should appear.

¹⁰ So in original. Probably should be “non-Federal”.

(iii) Provisions of regulations

Regardless of the date of promulgation, the regulations promulgated under clause (i)—

(I) shall contain compliance provisions applicable to refineries, blenders, distributors, and importers, as appropriate, to ensure that the requirements of this paragraph are met; but

(II) shall not—

(aa) restrict geographic areas in which renewable fuel may be used; or

(bb) impose any per-gallon obligation for the use of renewable fuel.

(iv) Requirement in case of failure to promulgate regulations

If the Administrator does not promulgate regulations under clause (i), the percentage of renewable fuel in gasoline sold or dispensed to consumers in the United States, on a volume basis, shall be 2.78 percent for calendar year 2006.

(B) Applicable volumes**(i) Calendar years after 2005****(I) Renewable fuel**

For the purpose of subparagraph (A), the applicable volume of renewable fuel for the calendar years 2006 through 2022 shall be determined in accordance with the following table:

Calendar year:	Applicable volume of renewable fuel (in billions of gallons):
2006	4.0
2007	4.7
2008	9.0
2009	11.1
2010	12.95
2011	13.95
2012	15.2
2013	16.55
2014	18.15
2015	20.5
2016	22.25
2017	24.0
2018	26.0
2019	28.0
2020	30.0
2021	33.0
2022	36.0

(II) Advanced biofuel

For the purpose of subparagraph (A), of the volume of renewable fuel required under subclause (I), the applicable volume of advanced biofuel for the calendar years 2009 through 2022 shall be determined in accordance with the following table:

Calendar year:	Applicable volume of advanced biofuel (in billions of gallons):
----------------	--

2009	0.6
2010	0.95
2011	1.35
2012	2.0
2013	2.75
2014	3.75
2015	5.5
2016	7.25
2017	9.0
2018	11.0
2019	13.0
2020	15.0
2021	18.0
2022	21.0

(III) Cellulosic biofuel

For the purpose of subparagraph (A), of the volume of advanced biofuel required under subclause (II), the applicable volume of cellulosic biofuel for the calendar years 2010 through 2022 shall be determined in accordance with the following table:

Calendar year:	Applicable volume of cellulosic biofuel (in billions of gallons):
2010	0.1
2011	0.25
2012	0.5
2013	1.0
2014	1.75
2015	3.0
2016	4.25
2017	5.5
2018	7.0
2019	8.5
2020	10.5
2021	13.5
2022	16.0

(IV) Biomass-based diesel

For the purpose of subparagraph (A), of the volume of advanced biofuel required under subclause (II), the applicable volume of biomass-based diesel for the calendar years 2009 through 2012 shall be determined in accordance with the following table:

Calendar year:	Applicable volume of biomass- based diesel (in billions of gallons):
2009	0.5
2010	0.65
2011	0.80
2012	1.0

(ii) Other calendar years

For the purposes of subparagraph (A), the applicable volumes of each fuel specified in the tables in clause (i) for calendar years after the calendar years specified in the tables shall be determined by the Administrator, in coordination with the Secretary of Energy and the Secretary of Agriculture, based on a review of the imple-

mentation of the program during calendar years specified in the tables, and an analysis of—

(I) the impact of the production and use of renewable fuels on the environment, including on air quality, climate change, conversion of wetlands, ecosystems, wildlife habitat, water quality, and water supply;

(II) the impact of renewable fuels on the energy security of the United States;

(III) the expected annual rate of future commercial production of renewable fuels, including advanced biofuels in each category (cellulosic biofuel and biomass-based diesel);

(IV) the impact of renewable fuels on the infrastructure of the United States, including deliverability of materials, goods, and products other than renewable fuel, and the sufficiency of infrastructure to deliver and use renewable fuel;

(V) the impact of the use of renewable fuels on the cost to consumers of transportation fuel and on the cost to transport goods; and

(VI) the impact of the use of renewable fuels on other factors, including job creation, the price and supply of agricultural commodities, rural economic development, and food prices.

The Administrator shall promulgate rules establishing the applicable volumes under this clause no later than 14 months before the first year for which such applicable volume will apply.

(iii) Applicable volume of advanced biofuel

For the purpose of making the determinations in clause (ii), for each calendar year, the applicable volume of advanced biofuel shall be at least the same percentage of the applicable volume of renewable fuel as in calendar year 2022.

(iv) Applicable volume of cellulosic biofuel

For the purpose of making the determinations in clause (ii), for each calendar year, the applicable volume of cellulosic biofuel established by the Administrator shall be based on the assumption that the Administrator will not need to issue a waiver for such years under paragraph (7)(D).

(v) Minimum applicable volume of biomass-based diesel

For the purpose of making the determinations in clause (ii), the applicable volume of biomass-based diesel shall not be less than the applicable volume listed in clause (i)(IV) for calendar year 2012.

(3) Applicable percentages

(A) Provision of estimate of volumes of gasoline sales

Not later than October 31 of each of calendar years 2005 through 2021, the Administrator of the Energy Information Administration shall provide to the Administrator of the Environmental Protection Agency an es-

timate, with respect to the following calendar year, of the volumes of transportation fuel, biomass-based diesel, and cellulosic biofuel projected to be sold or introduced into commerce in the United States.

(B) Determination of applicable percentages

(i) In general

Not later than November 30 of each of calendar years 2005 through 2021, based on the estimate provided under subparagraph (A), the Administrator of the Environmental Protection Agency shall determine and publish in the Federal Register, with respect to the following calendar year, the renewable fuel obligation that ensures that the requirements of paragraph (2) are met.

(ii) Required elements

The renewable fuel obligation determined for a calendar year under clause (i) shall—

(I) be applicable to refineries, blenders, and importers, as appropriate;

(II) be expressed in terms of a volume percentage of transportation fuel sold or introduced into commerce in the United States; and

(III) subject to subparagraph (C)(i), consist of a single applicable percentage that applies to all categories of persons specified in subclause (I).

(C) Adjustments

In determining the applicable percentage for a calendar year, the Administrator shall make adjustments—

(i) to prevent the imposition of redundant obligations on any person specified in subparagraph (B)(ii)(I); and

(ii) to account for the use of renewable fuel during the previous calendar year by small refineries that are exempt under paragraph (9).

(4) Modification of greenhouse gas reduction percentages

(A) In general

The Administrator may, in the regulations under the last sentence of paragraph (2)(A)(i), adjust the 20 percent, 50 percent, and 60 percent reductions in lifecycle greenhouse gas emissions specified in paragraphs (2)(A)(i) (relating to renewable fuel), (1)(D) (relating to biomass-based diesel), (1)(B)(i) (relating to advanced biofuel), and (1)(E) (relating to cellulosic biofuel) to a lower percentage. For the 50 and 60 percent reductions, the Administrator may make such an adjustment only if he determines that generally such reduction is not commercially feasible for fuels made using a variety of feedstocks, technologies, and processes to meet the applicable reduction.

(B) Amount of adjustment

In promulgating regulations under this paragraph, the specified 50 percent reduction in greenhouse gas emissions from advanced biofuel and in biomass-based diesel may not be reduced below 40 percent. The specified 20

percent reduction in greenhouse gas emissions from renewable fuel may not be reduced below 10 percent, and the specified 60 percent reduction in greenhouse gas emissions from cellulosic biofuel may not be reduced below 50 percent.

(C) Adjusted reduction levels

An adjustment under this paragraph to a percent less than the specified 20 percent greenhouse gas reduction for renewable fuel shall be the minimum possible adjustment, and the adjusted greenhouse gas reduction shall be established by the Administrator at the maximum achievable level, taking cost in consideration, for natural gas fired corn-based ethanol plants, allowing for the use of a variety of technologies and processes. An adjustment in the 50 or 60 percent greenhouse gas levels shall be the minimum possible adjustment for the fuel or fuels concerned, and the adjusted greenhouse gas reduction shall be established at the maximum achievable level, taking cost in consideration, allowing for the use of a variety of feedstocks, technologies, and processes.

(D) 5-year review

Whenever the Administrator makes any adjustment under this paragraph, not later than 5 years thereafter he shall review and revise (based upon the same criteria and standards as required for the initial adjustment) the regulations establishing the adjusted level.

(E) Subsequent adjustments

After the Administrator has promulgated a final rule under the last sentence of paragraph (2)(A)(i) with respect to the method of determining lifecycle greenhouse gas emissions, except as provided in subparagraph (D), the Administrator may not adjust the percent greenhouse gas reduction levels unless he determines that there has been a significant change in the analytical methodology used for determining the lifecycle greenhouse gas emissions. If he makes such determination, he may adjust the 20, 50, or 60 percent reduction levels through rulemaking using the criteria and standards set forth in this paragraph.

(F) Limit on upward adjustments

If, under subparagraph (D) or (E), the Administrator revises a percent level adjusted as provided in subparagraphs (A), (B), and (C) to a higher percent, such higher percent may not exceed the applicable percent specified in paragraph (2)(A)(i), (1)(D), (1)(B)(i), or (1)(E).

(G) Applicability of adjustments

If the Administrator adjusts, or revises, a percent level referred to in this paragraph or makes a change in the analytical methodology used for determining the lifecycle greenhouse gas emissions, such adjustment, revision, or change (or any combination thereof) shall only apply to renewable fuel from new facilities that commence construction after the effective date of such adjustment, revision, or change.

(5) Credit program

(A) In general

The regulations promulgated under paragraph (2)(A) shall provide—

- (i) for the generation of an appropriate amount of credits by any person that refines, blends, or imports gasoline that contains a quantity of renewable fuel that is greater than the quantity required under paragraph (2);
- (ii) for the generation of an appropriate amount of credits for biodiesel; and
- (iii) for the generation of credits by small refineries in accordance with paragraph (9)(C).

(B) Use of credits

A person that generates credits under subparagraph (A) may use the credits, or transfer all or a portion of the credits to another person, for the purpose of complying with paragraph (2).

(C) Duration of credits

A credit generated under this paragraph shall be valid to show compliance for the 12 months as of the date of generation.

(D) Inability to generate or purchase sufficient credits

The regulations promulgated under paragraph (2)(A) shall include provisions allowing any person that is unable to generate or purchase sufficient credits to meet the requirements of paragraph (2) to carry forward a renewable fuel deficit on condition that the person, in the calendar year following the year in which the renewable fuel deficit is created—

- (i) achieves compliance with the renewable fuel requirement under paragraph (2); and
- (ii) generates or purchases additional renewable fuel credits to offset the renewable fuel deficit of the previous year.

(E) Credits for additional renewable fuel

The Administrator may issue regulations providing: (i) for the generation of an appropriate amount of credits by any person that refines, blends, or imports additional renewable fuels specified by the Administrator; and (ii) for the use of such credits by the generator, or the transfer of all or a portion of the credits to another person, for the purpose of complying with paragraph (2).

(6) Seasonal variations in renewable fuel use

(A) Study

For each of calendar years 2006 through 2012, the Administrator of the Energy Information Administration shall conduct a study of renewable fuel blending to determine whether there are excessive seasonal variations in the use of renewable fuel.

(B) Regulation of excessive seasonal variations

If, for any calendar year, the Administrator of the Energy Information Administration, based on the study under subparagraph (A), makes the determinations speci-

fied in subparagraph (C), the Administrator of the Environmental Protection Agency shall promulgate regulations to ensure that 25 percent or more of the quantity of renewable fuel necessary to meet the requirements of paragraph (2) is used during each of the 2 periods specified in subparagraph (D) of each subsequent calendar year.

(C) Determinations

The determinations referred to in subparagraph (B) are that—

(i) less than 25 percent of the quantity of renewable fuel necessary to meet the requirements of paragraph (2) has been used during 1 of the 2 periods specified in subparagraph (D) of the calendar year;

(ii) a pattern of excessive seasonal variation described in clause (i) will continue in subsequent calendar years; and

(iii) promulgating regulations or other requirements to impose a 25 percent or more seasonal use of renewable fuels will not prevent or interfere with the attainment of national ambient air quality standards or significantly increase the price of motor fuels to the consumer.

(D) Periods

The 2 periods referred to in this paragraph are—

(i) April through September; and

(ii) January through March and October through December.

(E) Exclusion

Renewable fuel blended or consumed in calendar year 2006 in a State that has received a waiver under section 7543(b) of this title shall not be included in the study under subparagraph (A).

(F) State exemption from seasonality requirements

Notwithstanding any other provision of law, the seasonality requirement relating to renewable fuel use established by this paragraph shall not apply to any State that has received a waiver under section 7543(b) of this title or any State dependent on refineries in such State for gasoline supplies.

(7) Waivers

(A) In general

The Administrator, in consultation with the Secretary of Agriculture and the Secretary of Energy, may waive the requirements of paragraph (2) in whole or in part on petition by one or more States, by any person subject to the requirements of this subsection, or by the Administrator on his own motion by reducing the national quantity of renewable fuel required under paragraph (2)—

(i) based on a determination by the Administrator, after public notice and opportunity for comment, that implementation of the requirement would severely harm the economy or environment of a State, a region, or the United States; or

(ii) based on a determination by the Administrator, after public notice and opportunity for comment, that there is an inadequate domestic supply.

tunity for comment, that there is an inadequate domestic supply.

(B) Petitions for waivers

The Administrator, in consultation with the Secretary of Agriculture and the Secretary of Energy, shall approve or disapprove a petition for a waiver of the requirements of paragraph (2) within 90 days after the date on which the petition is received by the Administrator.

(C) Termination of waivers

A waiver granted under subparagraph (A) shall terminate after 1 year, but may be renewed by the Administrator after consultation with the Secretary of Agriculture and the Secretary of Energy.

(D) Cellulosic biofuel

(i) For any calendar year for which the projected volume of cellulosic biofuel production is less than the minimum applicable volume established under paragraph (2)(B), as determined by the Administrator based on the estimate provided under paragraph (3)(A), not later than November 30 of the preceding calendar year, the Administrator shall reduce the applicable volume of cellulosic biofuel required under paragraph (2)(B) to the projected volume available during that calendar year. For any calendar year in which the Administrator makes such a reduction, the Administrator may also reduce the applicable volume of renewable fuel and advanced biofuels requirement established under paragraph (2)(B) by the same or a lesser volume.

(ii) Whenever the Administrator reduces the minimum cellulosic biofuel volume under this subparagraph, the Administrator shall make available for sale cellulosic biofuel credits at the higher of \$0.25 per gallon or the amount by which \$3.00 per gallon exceeds the average wholesale price of a gallon of gasoline in the United States. Such amounts shall be adjusted for inflation by the Administrator for years after 2008.

(iii) Eighteen months after December 19, 2007, the Administrator shall promulgate regulations to govern the issuance of credits under this subparagraph. The regulations shall set forth the method for determining the exact price of credits in the event of a waiver. The price of such credits shall not be changed more frequently than once each quarter. These regulations shall include such provisions, including limiting the credits' uses and useful life, as the Administrator deems appropriate to assist market liquidity and transparency, to provide appropriate certainty for regulated entities and renewable fuel producers, and to limit any potential misuse of cellulosic biofuel credits to reduce the use of other renewable fuels, and for such other purposes as the Administrator determines will help achieve the goals of this subsection. The regulations shall limit the number of cellulosic biofuel credits for any calendar year to the minimum applicable volume (as reduced under this subparagraph) of cellulosic biofuel for that year.

(E) Biomass-based diesel**(i) Market evaluation**

The Administrator, in consultation with the Secretary of Energy and the Secretary of Agriculture, shall periodically evaluate the impact of the biomass-based diesel requirements established under this paragraph on the price of diesel fuel.

(ii) Waiver

If the Administrator determines that there is a significant renewable feedstock disruption or other market circumstances that would make the price of biomass-based diesel fuel increase significantly, the Administrator, in consultation with the Secretary of Energy and the Secretary of Agriculture, shall issue an order to reduce, for up to a 60-day period, the quantity of biomass-based diesel required under subparagraph (A) by an appropriate quantity that does not exceed 15 percent of the applicable annual requirement for biomass-based diesel. For any calendar year in which the Administrator makes a reduction under this subparagraph, the Administrator may also reduce the applicable volume of renewable fuel and advanced biofuels requirement established under paragraph (2)(B) by the same or a lesser volume.

(iii) Extensions

If the Administrator determines that the feedstock disruption or circumstances described in clause (ii) is continuing beyond the 60-day period described in clause (ii) or this clause, the Administrator, in consultation with the Secretary of Energy and the Secretary of Agriculture, may issue an order to reduce, for up to an additional 60-day period, the quantity of biomass-based diesel required under subparagraph (A) by an appropriate quantity that does not exceed an additional 15 percent of the applicable annual requirement for biomass-based diesel.

(F) Modification of applicable volumes

For any of the tables in paragraph (2)(B), if the Administrator waives—

- (i) at least 20 percent of the applicable volume requirement set forth in any such table for 2 consecutive years; or
- (ii) at least 50 percent of such volume requirement for a single year,

the Administrator shall promulgate a rule (within 1 year after issuing such waiver) that modifies the applicable volumes set forth in the table concerned for all years following the final year to which the waiver applies, except that no such modification in applicable volumes shall be made for any year before 2016. In promulgating such a rule, the Administrator shall comply with the processes, criteria, and standards set forth in paragraph (2)(B)(ii).

(8) Study and waiver for initial year of program**(A) In general**

Not later than 180 days after August 8, 2005, the Secretary of Energy shall conduct

for the Administrator a study assessing whether the renewable fuel requirement under paragraph (2) will likely result in significant adverse impacts on consumers in 2006, on a national, regional, or State basis.

(B) Required evaluations

The study shall evaluate renewable fuel—

- (i) supplies and prices;
- (ii) blendstock supplies; and
- (iii) supply and distribution system capabilities.

(C) Recommendations by the Secretary

Based on the results of the study, the Secretary of Energy shall make specific recommendations to the Administrator concerning waiver of the requirements of paragraph (2), in whole or in part, to prevent any adverse impacts described in subparagraph (A).

(D) Waiver**(i) In general**

Not later than 270 days after August 8, 2005, the Administrator shall, if and to the extent recommended by the Secretary of Energy under subparagraph (C), waive, in whole or in part, the renewable fuel requirement under paragraph (2) by reducing the national quantity of renewable fuel required under paragraph (2) in calendar year 2006.

(ii) No effect on waiver authority

Clause (i) does not limit the authority of the Administrator to waive the requirements of paragraph (2) in whole, or in part, under paragraph (7).

(9) Small refineries**(A) Temporary exemption****(i) In general**

The requirements of paragraph (2) shall not apply to small refineries until calendar year 2011.

(ii) Extension of exemption**(I) Study by Secretary of Energy**

Not later than December 31, 2008, the Secretary of Energy shall conduct for the Administrator a study to determine whether compliance with the requirements of paragraph (2) would impose a disproportionate economic hardship on small refineries.

(II) Extension of exemption

In the case of a small refinery that the Secretary of Energy determines under subclause (I) would be subject to a disproportionate economic hardship if required to comply with paragraph (2), the Administrator shall extend the exemption under clause (i) for the small refinery for a period of not less than 2 additional years.

(B) Petitions based on disproportionate economic hardship**(i) Extension of exemption**

A small refinery may at any time petition the Administrator for an extension of

the exemption under subparagraph (A) for the reason of disproportionate economic hardship.

(ii) Evaluation of petitions

In evaluating a petition under clause (i), the Administrator, in consultation with the Secretary of Energy, shall consider the findings of the study under subparagraph (A)(i) and other economic factors.

(iii) Deadline for action on petitions

The Administrator shall act on any petition submitted by a small refinery for a hardship exemption not later than 90 days after the date of receipt of the petition.

(C) Credit program

If a small refinery notifies the Administrator that the small refinery waives the exemption under subparagraph (A), the regulations promulgated under paragraph (2)(A) shall provide for the generation of credits by the small refinery under paragraph (5) beginning in the calendar year following the date of notification.

(D) Opt-in for small refineries

A small refinery shall be subject to the requirements of paragraph (2) if the small refinery notifies the Administrator that the small refinery waives the exemption under subparagraph (A).

(10) Ethanol market concentration analysis

(A) Analysis

(i) In general

Not later than 180 days after August 8, 2005, and annually thereafter, the Federal Trade Commission shall perform a market concentration analysis of the ethanol production industry using the Herfindahl-Hirschman Index to determine whether there is sufficient competition among industry participants to avoid price-setting and other anticompetitive behavior.

(ii) Scoring

For the purpose of scoring under clause (i) using the Herfindahl-Hirschman Index, all marketing arrangements among industry participants shall be considered.

(B) Report

Not later than December 1, 2005, and annually thereafter, the Federal Trade Commission shall submit to Congress and the Administrator a report on the results of the market concentration analysis performed under subparagraph (A)(i).

(11) Periodic reviews

To allow for the appropriate adjustment of the requirements described in subparagraph (B) of paragraph (2), the Administrator shall conduct periodic reviews of—

- (A) existing technologies;
- (B) the feasibility of achieving compliance with the requirements; and
- (C) the impacts of the requirements described in subsection (a)(2)¹¹ on each individual and entity described in paragraph (2).

¹¹ So in original. Subsection (a) does not contain a par. (2).

(12) Effect on other provisions

Nothing in this subsection, or regulations issued pursuant to this subsection, shall affect or be construed to affect the regulatory status of carbon dioxide or any other greenhouse gas, or to expand or limit regulatory authority regarding carbon dioxide or any other greenhouse gas, for purposes of other provisions (including section 7475) of this chapter. The previous sentence shall not affect implementation and enforcement of this subsection.

(q)¹² Analyses of motor vehicle fuel changes and emissions model

(1) Anti-backsliding analysis

(A) Draft analysis

Not later than 4 years after August 8, 2005, the Administrator shall publish for public comment a draft analysis of the changes in emissions of air pollutants and air quality due to the use of motor vehicle fuel and fuel additives resulting from implementation of the amendments made by the Energy Policy Act of 2005.

(B) Final analysis

After providing a reasonable opportunity for comment but not later than 5 years after August 8, 2005, the Administrator shall publish the analysis in final form.

(2) Emissions model

For the purposes of this section, not later than 4 years after August 8, 2005, the Administrator shall develop and finalize an emissions model that reflects, to the maximum extent practicable, the effects of gasoline characteristics or components on emissions from vehicles in the motor vehicle fleet during calendar year 2007.

(3) Permeation effects study

(A) In general

Not later than 1 year after August 8, 2005, the Administrator shall conduct a study, and report to Congress the results of the study, on the effects of ethanol content in gasoline on permeation, the process by which fuel molecules migrate through the elastomeric materials (rubber and plastic parts) that make up the fuel and fuel vapor systems of a motor vehicle.

(B) Evaporative emissions

The study shall include estimates of the increase in total evaporative emissions likely to result from the use of gasoline with ethanol content in a motor vehicle, and the fleet of motor vehicles, due to permeation.

(r) Fuel and fuel additive importers and importation

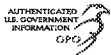
For the purposes of this section, the term “manufacturer” includes an importer and the term “manufacture” includes importation.

(s) Conversion assistance for cellulosic biomass, waste-derived ethanol, approved renewable fuels

(1) In general

The Secretary of Energy may provide grants to merchant producers of cellulosic biomass

¹² So in original. No subsec. (p) has been enacted.



Act or the Water Act or any rules, regulations, standards, or guidelines issued pursuant to this Order to the head of the agency, who shall transmit such reports to the Administrator.

SEC. 7. *Enforcement.* The Administrator may recommend to the Department of Justice or other appropriate agency that legal proceedings be brought or other appropriate action be taken whenever he becomes aware of a breach of any provision required, under the amendments issued pursuant to section 4 of this Order, to be included in a contract or other agreement.

SEC. 8. *Exemptions—Reports to Congress.* (a) Upon a determination that the paramount interest of the United States so requires—

(1) The head of a Federal agency may exempt any contract, grant, or loan, and, following consultation with the Administrator, any class of contracts, grants or loans from the provisions of this Order. In any such case, the head of the Federal agency granting such exemption shall (A) promptly notify the Administrator of such exemption and the justification therefor; (B) review the necessity for each such exemption annually; and (C) report to the Administrator annually all such exemptions in effect. Exemptions granted pursuant to this section shall be for a period not to exceed one year. Additional exemptions may be granted for periods not to exceed one year upon the making of a new determination by the head of the Federal agency concerned.

(2) The Administrator may, by rule or regulation, exempt any or all Federal agencies from any or all of the provisions of this Order with respect to any class or classes of contracts, grants, or loans, which (A) involve less than specified dollar amounts, or (B) have a minimal potential impact upon the environment, or (C) involve persons who are not prime contractors or direct recipients of Federal assistance by way of contracts, grants, or loans.

(b) Federal agencies shall reconsider any exemption granted under subsection (a) whenever requested to do so by the Administrator.

(c) The Administrator shall annually notify the President and the Congress of all exemptions granted, or in effect, under this Order during the preceding year.

SEC. 9. *Related Actions.* The imposition of any sanction or penalty under or pursuant to this Order shall not relieve any person of any legal duty to comply with any provisions of the Air Act or the Water Act.

SEC. 10. *Applicability.* This Order shall not apply to contracts, grants, or loans involving the use of facilities located outside the United States.

SEC. 11. *Uniformity.* Rules, regulations, standards, and guidelines issued pursuant to this order and section 508 of the Water Act [33 U.S.C. 1368] shall, to the maximum extent feasible, be uniform with regulations issued pursuant to this order, Executive Order No. 11602 of June 29, 1971 [formerly set out above], and section 306 of the Air Act [this section].

SEC. 12. *Order Superseded.* Executive Order No. 11602 of June 29, 1971, is hereby superseded.

RICHARD NIXON.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 7607 of this title.

§ 7607. Administrative proceedings and judicial review

(a) Administrative subpoenas; confidentiality; witnesses

In connection with any determination under section 7410(f) of this title, or for purposes of obtaining information under section 7521(b)(4)¹ or 7545(c)(3) of this title, any investigation, monitoring, reporting requirement, entry, compliance inspection, or administrative enforcement proceeding under the² chapter (including but

not limited to section 7413, section 7414, section 7420, section 7429, section 7477, section 7524, section 7525, section 7542, section 7603, or section 7606 of this title),³ the Administrator may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 7521(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpoena served upon any person under this subparagraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5)¹ of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title,³ under section 7419 of this title, or under section 7420 of this title, or his action under section

¹ See References in Text note below.

² So in original. Probably should be "this".

³ So in original.

1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

(c) Additional evidence

In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to⁴ the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(d) Rulemaking

(1) This subsection applies to—

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title, or emission standard or limitation under section 7412(d) of this title, any standard under section 7412(f) of this title, or any regulation under section 7412(g)(1)(D) and (F) of this title, or any regulation under section 7412(m) or (n) of this title,

(D) the promulgation of any requirement for solid waste combustion under section 7429 of this title,

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(F) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(G) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to control of acid deposition),

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under subchapter VI of this chapter (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(L) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(M) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement),

(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title,

(P) the promulgation or revision of any regulation pertaining to field citations under section 7413(d)(3) of this title,

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of subchapter II of this chapter,

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 7547 of this title,

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 7552 of this title,

⁴So in original. The word "to" probably should not appear.

(T) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 7511b(f) of this title pertaining to marine vessels, and

(V) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rule-making shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but

within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

(e) Other methods of judicial review not authorized

Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

(f) Costs

In any judicial proceeding under this section, the court may award costs of litigation (includ-

ing reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

(g) Stay, injunction, or similar relief in proceedings relating to noncompliance penalties

In any action respecting the promulgation of regulations under section 7420 of this title or the administration or enforcement of section 7420 of this title no court shall grant any stay, injunctive, or similar relief before final judgment by such court in such action.

(h) Public participation

It is the intent of Congress that, consistent with the policy of subchapter II of chapter 5 of title 5, the Administrator in promulgating any regulation under this chapter, including a regulation subject to a deadline, shall ensure a reasonable period for public participation of at least 30 days, except as otherwise expressly provided in section⁵ 7407(d), 7502(a), 7511(a) and (b), and 7512(a) and (b) of this title.

(July 14, 1955, ch. 360, title III, §307, as added Pub. L. 91-604, §12(a), Dec. 31, 1970, 84 Stat. 1707; amended Pub. L. 92-157, title III, §302(a), Nov. 18, 1971, 85 Stat. 464; Pub. L. 93-319, §6(c), June 22, 1974, 88 Stat. 259; Pub. L. 95-95, title III, §303(d), 305(a), (c), (f)-(h), Aug. 7, 1977, 91 Stat. 772, 776, 777; Pub. L. 95-190, §14(a)(79), (80), Nov. 16, 1977, 91 Stat. 1404; Pub. L. 101-549, title I, §§108(p), 110(5), title III, §302(g), (h), title VII, §§702(c), 703, 706, 707(h), 710(b), Nov. 15, 1990, 104 Stat. 2469, 2470, 2574, 2681-2684.)

REFERENCES IN TEXT

Section 7521(b)(4) of this title, referred to in subsec. (a), was repealed by Pub. L. 101-549, title II, §203(2), Nov. 15, 1990, 104 Stat. 2529.

Section 7521(b)(5) of this title, referred to in subsec. (b)(1), was repealed by Pub. L. 101-549, title II, §203(3), Nov. 15, 1990, 104 Stat. 2529.

Section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977), referred to in subsec. (b)(1), was in the original "section 119(c)(2)(A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977)", meaning section 119 of act July 14, 1955, ch. 360, title I, as added June 22, 1974, Pub. L. 93-319, §3, 88 Stat. 248, (which was classified to section 1857c-10 of this title) as in effect prior to the enactment of Pub. L. 95-95, Aug. 7, 1977, 91 Stat. 691, effective Aug. 7, 1977. Section 112(b)(1) of Pub. L. 95-95 repealed section 119 of act July 14, 1955, ch. 360, title I, as added by Pub. L. 93-319, and provided that all references to such section 119 in any subsequent enactment which supersedes Pub. L. 93-319 shall be construed to refer to section 113(d) of the Clean Air Act and to paragraph (5) thereof in particular which is classified to subsec. (d)(5) of section 7413 of this title. Section 7413(d) of this title was subsequently amended generally by Pub. L. 101-549, title VII, §701, Nov. 15, 1990, 104 Stat. 2672, and, as so amended, no longer relates to final compliance orders. Section 117(b) of Pub. L. 95-95 added a new section 119 of act July 14, 1955, which is classified to section 7419 of this title.

Part C of subchapter I of this chapter, referred to in subsec. (d)(1)(J), was in the original "subtitle C of title I", and was translated as reading "part C of title I" to reflect the probable intent of Congress, because title I does not contain subtitles.

CODIFICATION

In subsec. (h), "subchapter II of chapter 5 of title 5" was substituted for "the Administrative Procedures

⁵ So in original. Probably should be "sections".

Act" on authority of Pub. L. 89-554, §7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees.

Section was formerly classified to section 1857h-5 of this title.

PRIOR PROVISIONS

A prior section 307 of act July 14, 1955, was renumbered section 314 by Pub. L. 91-604 and is classified to section 7614 of this title.

Another prior section 307 of act July 14, 1955, ch. 360, title III, formerly §14, as added Dec. 17, 1963, Pub. L. 88-206, §1, 77 Stat. 401, was renumbered section 307 by Pub. L. 89-272, renumbered section 310 by Pub. L. 90-148, and renumbered section 317 by Pub. L. 91-604, and is set out as a Short Title note under section 7401 of this title.

AMENDMENTS

1990—Subsec. (a). Pub. L. 101-549, §703, struck out par. (1) designation at beginning, inserted provisions authorizing issuance of subpoenas and administration of oaths for purposes of investigations, monitoring, reporting requirements, entries, compliance inspections, or administrative enforcement proceedings under this chapter, and struck out "or section 7521(b)(5)" after "section 7410(f)".

Subsec. (b)(1). Pub. L. 101-549, §706, struck out "under section 7413(d) of this title" before ", under section 7419 of this title" and inserted at end: "The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action."

Pub. L. 101-549, §702(c), inserted "or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title," before "or any other final action of the Administrator".

Pub. L. 101-549, §302(g), substituted "section 7412" for "section 7412(c)".

Subsec. (b)(2). Pub. L. 101-549, §707(h), inserted sentence at end authorizing challenge to deferrals of performance of nondiscretionary statutory actions.

Subsec. (d)(1)(C). Pub. L. 101-549, §110(5)(A), amended subpar. (C) generally. Prior to amendment, subpar. (C) read as follows: "the promulgation or revision of any standard of performance under section 7411 of this title or emission standard under section 7412 of this title,".

Subsec. (d)(1)(D), (E). Pub. L. 101-549, §302(h), added subpar. (D) and redesignated former subpar. (D) as (E). Former subpar. (E) redesignated (F).

Subsec. (d)(1)(F). Pub. L. 101-549, §302(h), redesignated subpar. (E) as (F). Former subpar. (F) redesignated (G).

Pub. L. 101-549, §110(5)(B), amended subpar. (F) generally. Prior to amendment, subpar. (F) read as follows: "promulgation or revision of regulations pertaining to orders for coal conversion under section 7413(d)(5) of this title (but not including orders granting or denying any such orders)".

Subsec. (d)(1)(G), (H). Pub. L. 101-549, §302(h), redesignated subpars. (F) and (G) as (G) and (H), respectively. Former subpar. (H) redesignated (I).

Subsec. (d)(1)(I). Pub. L. 101-549, §710(b), which directed that subpar. (H) be amended by substituting "subchapter VI of this chapter" for "part B of subchapter I of this chapter", was executed by making the substitution in subpar. (I), to reflect the probable intent of Congress and the intervening redesignation of subpar. (H) as (I) by Pub. L. 101-549, §302(h), see below.

Pub. L. 101-549, §302(h), redesignated subpar. (H) as (I). Former subpar. (I) redesignated (J).

Subsec. (d)(1)(J) to (M). Pub. L. 101-549, §302(h), redesignated subpars. (I) to (L) as (J) to (M), respectively. Former subpar. (M) redesignated (N).

Subsec. (d)(1)(N). Pub. L. 101-549, §302(h), redesignated subpar. (M) as (N). Former subpar. (N) redesignated (O).

Pub. L. 101-549, §110(5)(C), added subpar. (N) and redesignated former subpar. (N) as (U).

Subsec. (d)(1)(O) to (T). Pub. L. 101-549, §302(h), redesignated subpars. (N) to (S) as (O) to (T), respectively. Former subpar. (T) redesignated (U).

Pub. L. 101-549, §110(5)(C), added subpars. (O) to (T).

Subsec. (d)(1)(U). Pub. L. 101-549, §302(h), redesignated subpar. (T) as (U). Former subpar. (U) redesignated (V).

Pub. L. 101-549, §110(5)(C), redesignated former subpar. (N) as (U).

Subsec. (d)(1)(V). Pub. L. 101-549, §302(h), redesignated subpar. (U) as (V).

Subsec. (h). Pub. L. 101-549, §108(p), added subsec. (h). 1977—Subsec. (b)(1). Pub. L. 95-190 in text relating to filing of petitions for review in the United States Court of Appeals for the District of Columbia inserted provision respecting requirements under sections 7411 and 7412 of this title, and substituted provisions authorizing review of any rule issued under section 7413, 7419, or 7420 of this title, for provisions authorizing review of any rule or order issued under section 7420 of this title, relating to noncompliance penalties, and in text relating to filing of petitions for review in the United States Court of Appeals for the appropriate circuit inserted provision respecting review under section 7411(j), 7412(c), 7413(d), or 7419 of this title, provision authorizing review under section 1857c-10(c)(2)(A), (B), or (C) to the period prior to Aug. 7, 1977, and provisions authorizing review of denials or disapprovals by the Administrator under subchapter I of this chapter.

Pub. L. 95-95, §305(c), (h), inserted rules or orders issued under section 7420 of this title (relating to noncompliance penalties) and any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter to the enumeration of actions of the Administrator for which a petition for review may be filed only in the United States Court of Appeals for the District of Columbia, added the approval or promulgation by the Administrator of orders under section 7420 of this title, or any other final action of the Administrator under this chapter which is locally or regionally applicable to the enumeration of actions by the Administrator for which a petition for review may be filed only in the United States Court of Appeals for the appropriate circuit, inserted provision that petitions otherwise capable of being filed in the Court of Appeals for the appropriate circuit may be filed only in the Court of Appeals for the District of Columbia if the action is based on a determination of nationwide scope, and increased from 30 days to 60 days the period during which the petition must be filed.

Subsec. (d). Pub. L. 95-95, §305(a), added subsec. (d).

Subsec. (e). Pub. L. 95-95, §303(d), added subsec. (e).

Subsec. (f). Pub. L. 95-95, §305(f), added subsec. (f).

Subsec. (g). Pub. L. 95-95, §305(g), added subsec. (g).

1974—Subsec. (b)(1). Pub. L. 93-319 inserted reference to the Administrator's action under section 1857c-10(c)(2)(A), (B), or (C) of this title or under regulations thereunder and substituted reference to the filing of a petition within 30 days from the date of promulgation, approval, or action for reference to the filing of a petition within 30 days from the date of promulgation or approval.

1971—Subsec. (a)(1). Pub. L. 92-157 substituted reference to section "7545(c)(3)" for "7545(c)(4)" of this title.

EFFECTIVE DATE OF 1977 AMENDMENT

Amendment by Pub. L. 95-95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95-95, set out as a note under section 7401 of this title.

TERMINATION OF ADVISORY COMMITTEES

Advisory committees established after Jan. 5, 1973, to terminate not later than the expiration of the 2-year period beginning on the date of their establishment, unless, in the case of a committee established by the

President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a committee established by the Congress, its duration is otherwise provided for by law. See section 14 of Pub. L. 92-463, Oct. 6, 1972, 86 Stat. 776, set out in the Appendix to Title 5, Government Organization and Employees.

PENDING ACTIONS AND PROCEEDINGS

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95-95 [Aug. 7, 1977], not to abate by reason of the taking effect of Pub. L. 95-95, see section 406(a) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

MODIFICATION OR RESCISSION OF RULES, REGULATIONS, ORDERS, DETERMINATIONS, CONTRACTS, CERTIFICATIONS, AUTHORIZATIONS, DELEGATIONS, AND OTHER ACTIONS

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect immediately prior to the date of enactment of Pub. L. 95-95 [Aug. 7, 1977] to continue in full force and effect until modified or rescinded in accordance with act July 14, 1955, as amended by Pub. L. 95-95 [this chapter], see section 406(b) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 7412, 7413, 7419, 7420, 7429, 7506a, 7521, 7545, 7601, 7604, 7617, 7625-1, 7661d of this title.

§ 7608. Mandatory licensing

Whenever the Attorney General determines, upon application of the Administrator—

(1) that—

(A) in the implementation of the requirements of section 7411, 7412, or 7521 of this title, a right under any United States letters patent, which is being used or intended for public or commercial use and not otherwise reasonably available, is necessary to enable any person required to comply with such limitation to so comply, and

(B) there are no reasonable alternative methods to accomplish such purpose, and

(2) that the unavailability of such right may result in a substantial lessening of competition or tendency to create a monopoly in any line of commerce in any section of the country,

the Attorney General may so certify to a district court of the United States, which may issue an order requiring the person who owns such patent to license it on such reasonable terms and conditions as the court, after hearing, may determine. Such certification may be made to the district court for the district in which the person owning the patent resides, does business, or is found.

(July 14, 1955, ch. 360, title III, §308, as added Pub. L. 91-604, §12(a), Dec. 31, 1970, 84 Stat. 1708.)

CODIFICATION

Section was formerly classified to section 1857h-6 of this title.

PRIOR PROVISIONS

A prior section 308 of act July 14, 1955, was renumbered section 315 by Pub. L. 91-604 and is classified to section 7615 of this title.

MODIFICATION OR RESCISSION OF RULES, REGULATIONS, ORDERS, DETERMINATIONS, CONTRACTS, CERTIFICATIONS, AUTHORIZATIONS, DELEGATIONS, AND OTHER ACTIONS

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect immediately prior to the date of enactment of Pub. L. 95-95 [Aug. 7, 1977] to continue in full force and effect until modified or rescinded in accordance with act July 14, 1955, as amended by Pub. L. 95-95 [this chapter], see section 406(b) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

§ 7609. Policy review

(a) Environmental impact

The Administrator shall review and comment in writing on the environmental impact of any matter relating to duties and responsibilities granted pursuant to this chapter or other provisions of the authority of the Administrator, contained in any (1) legislation proposed by any Federal department or agency, (2) newly authorized Federal projects for construction and any major Federal agency action (other than a project for construction) to which section 4332(2)(C) of this title applies, and (3) proposed regulations published by any department or agency of the Federal Government. Such written comment shall be made public at the conclusion of any such review.

(b) Unsatisfactory legislation, action, or regulation

In the event the Administrator determines that any such legislation, action, or regulation is unsatisfactory from the standpoint of public health or welfare or environmental quality, he shall publish his determination and the matter shall be referred to the Council on Environmental Quality.

(July 14, 1955, ch. 360, title III, §309, as added Pub. L. 91-604, §12(a), Dec. 31, 1970, 84 Stat. 1709.)

CODIFICATION

Section was formerly classified to section 1857h-7 of this title.

PRIOR PROVISIONS

A prior section 309 of act July 14, 1955, ch. 360, title III, formerly §13, as added Dec. 17, 1963, Pub. L. 88-206, §1, 77 Stat. 401; renumbered §306, Oct. 20, 1965, Pub. L. 89-272, title I, §101(4), 79 Stat. 992; renumbered §309, Nov. 21, 1967, Pub. L. 90-148, §2, 81 Stat. 506; renumbered §316, Dec. 31, 1970, Pub. L. 91-604, §12(a), 84 Stat. 1705, related to appropriations and was classified to section 1857l of this title, prior to repeal by section 306 of Pub. L. 95-95. See section 7626 of this title.

MODIFICATION OR RESCISSION OF RULES, REGULATIONS, ORDERS, DETERMINATIONS, CONTRACTS, CERTIFICATIONS, AUTHORIZATIONS, DELEGATIONS, AND OTHER ACTIONS

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect

**§§ 80.1433–80.1439****§§ 80.1433–80.1439 [Reserved]****§ 80.1440 What are the provisions for blenders who handle and blend less than 250,000 gallons of renewable fuel per year?**

(a) Renewable fuel blenders who handle and blend less than 250,000 gallons of renewable fuel per year, and who do not have one or more reported or unreported Renewable Volume Obligations, are permitted to delegate their RIN-related responsibilities to the party directly upstream of them who supplied the renewable fuel for blending.

(b) The RIN-related responsibilities that may be delegated directly upstream include all of the following:

(1) The RIN separation requirements of § 80.1429.

(2) The reporting requirements of § 80.1451.

(3) The recordkeeping requirements of § 80.1454.

(4) The attest engagement requirements of § 80.1464.

(c) For upstream delegation of RIN-related responsibilities, both parties must agree on the delegation, and a quarterly written statement signed by both parties must be included with the reporting party's reports under § 80.1451.

(1) Both parties must keep copies of the signed quarterly written statement agreeing to the upward delegation for 5 years.

(2) Parties delegating their RIN responsibilities upward shall keep copies of their registration forms as submitted to EPA.

(3) A renewable fuel blender who delegates its RIN-related responsibilities under this section will remain liable for any violation of this subpart M associated with its renewable fuel blending activities.

(d) Renewable fuel blenders who handle and blend less than 250,000 gallons of renewable fuel per year and delegate their RIN-related responsibilities under paragraph (b) of this section must register pursuant to § 80.1450(e), and may not own RINs.

(e) Renewable fuel blenders who handle and blend less than 250,000 gallons of renewable fuel per year and who do not opt to delegate their RIN-related responsibilities, or own RINs, will be

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subject to all requirements stated in paragraph (b) of this section, and all other applicable requirements of this subpart M.

[75 FR 14863, Mar. 26, 2010, as amended at 75 FR 26042, May 10, 2010; 79 FR 42162, July 18, 2014]

§ 80.1441 Small refinery exemption.

(a)(1) Transportation fuel produced at a refinery by a refiner, or foreign refiner (as defined at § 80.1465(a)), is exempt from January 1, 2010 through December 31, 2010 from the renewable fuel standards of § 80.1405, and the owner or operator of the refinery, or foreign refinery, is exempt from the requirements that apply to obligated parties under this subpart M for fuel produced at the refinery if the refinery meets the definition of a small refinery under § 80.1401 for calendar year 2006.

(2) The exemption of paragraph (a)(1) of this section shall apply unless a refiner chooses to waive this exemption (as described in paragraph (f) of this section), or the exemption is extended (as described in paragraph (e) of this section).

(3) For the purposes of this section, the term “refiner” shall include foreign refiners.

(4) This exemption shall only apply to refineries that process crude oil through refinery processing units.

(5) The small refinery exemption is effective immediately, except as specified in paragraph (b)(3) of this section.

(6) Refiners who own refineries that qualified as small under 40 CFR 80.1141 do not need to resubmit a small refinery verification letter under this subpart M. This paragraph (a) does not supersede § 80.1141.

(b)(1) A refiner owning a small refinery must submit a verification letter to EPA containing all of the following information:

(i) The annual average aggregate daily crude oil throughput for the period January 1, 2006 through December 31, 2006 (as determined by dividing the aggregate throughput for the calendar year by the number 365).

(ii) A letter signed by the president, chief operating or chief executive officer of the company, or his/her designee, stating that the information contained in the letter is true to the best of his/

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her knowledge, and that the refinery was small as of December 31, 2006.

(iii) Name, address, phone number, facsimile number, and e-mail address of a corporate contact person.

(2) Verification letters must be submitted by July 1, 2010 to one of the addresses listed in paragraph (h) of this section.

(3) For foreign refiners the small refinery exemption shall be effective upon approval, by EPA, of a small refinery application. The application must contain all of the elements required for small refinery verification letters (as specified in paragraph (b)(1) of this section), must satisfy the provisions of § 80.1465(f) through (i) and (o), and must be submitted by July 1, 2010 to one of the addresses listed in paragraph (h) of this section.

(4) Small refinery verification letters are not required for those refiners who have already submitted a complete verification letter under subpart K of this part 80. Verification letters submitted under subpart K prior to July 1, 2010 that satisfy the requirements of subpart K shall be deemed to satisfy the requirements for verification letters under this subpart M.

(c) If EPA finds that a refiner provided false or inaccurate information regarding a refinery's crude throughput (pursuant to paragraph (b)(1)(i) of this section) in its small refinery verification letter, the exemption will be void as of the effective date of these regulations.

(d) If a refiner is complying on an aggregate basis for multiple refineries, any such refiner may exclude from the calculation of its Renewable Volume Obligations (under § 80.1407) transportation fuel from any refinery receiving the small refinery exemption under paragraph (a) of this section.

(e)(1) The exemption period in paragraph (a) of this section shall be extended by the Administrator for a period of not less than two additional years if a study by the Secretary of Energy determines that compliance with the requirements of this subpart would impose a disproportionate economic hardship on a small refinery.

(2) A refiner may petition the Administrator for an extension of its small refinery exemption, based on dispropor-

tionate economic hardship, at any time.

(i) A petition for an extension of the small refinery exemption must specify the factors that demonstrate a disproportionate economic hardship and must provide a detailed discussion regarding the hardship the refinery would face in producing transportation fuel meeting the requirements of § 80.1405 and the date the refiner anticipates that compliance with the requirements can reasonably be achieved at the small refinery.

(ii) The Administrator shall act on such a petition not later than 90 days after the date of receipt of the petition.

(iii) In order to qualify for an extension of its small refinery exemption, a refinery must meet the definition of "small refinery" in § 80.1401 for the most recent full calendar year prior to seeking an extension and must be projected to meet the definition of "small refinery" in § 80.1401 for the year or years for which an exemption is sought. Failure to meet the definition of small refinery for any calendar year for which an exemption was granted would invalidate the exemption for that calendar year.

(f) At any time, a refiner with a small refinery exemption under paragraph (a) of this section may waive that exemption upon notification to EPA.

(1) A refiner's notice to EPA that it intends to waive its small refinery exemption must be received by November 1 to be effective in the next compliance year.

(2) The waiver will be effective beginning on January 1 of the following calendar year, at which point the transportation fuel produced at that refinery will be subject to the renewable fuels standard of § 80.1405 and the owner or operator of the refinery shall be subject to all other requirements that apply to obligated parties under this Subpart M.

(3) The waiver notice must be sent to EPA at one of the addresses listed in paragraph (h) of this section.

(g) A refiner that acquires a refinery from either an approved small refiner (as defined under § 80.1442(a)) or another refiner with an approved small refinery exemption under paragraph (a) of this

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section shall notify EPA in writing no later than 20 days following the acquisition.

(h) Verification letters under paragraph (b) of this section, petitions for small refinery hardship extensions under paragraph (e) of this section, and small refinery exemption waiver notices under paragraph (f) of this section shall be sent to one of the following addresses:

(1) *For US mail:* U.S. EPA, Attn: RFS Program, 6406J, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

(2) *For overnight or courier services:* U.S. EPA, Attn: RFS Program, 6406J, 1310 L Street, NW., 6th floor, Washington, DC 20005. (202) 343-9038.

[75 FR 14863, Mar. 26, 2010, as amended at 79 FR 42163, July 18, 2014]

§ 80.1442 What are the provisions for small refiners under the RFS program?

(a)(1) To qualify as a small refiner under this section, a refiner must meet all of the following criteria:

(i) The refiner produced transportation fuel at its refineries by processing crude oil through refinery processing units from January 1, 2006 through December 31, 2006.

(ii) The refiner employed an average of no more than 1,500 people, based on the average number of employees for all pay periods for calendar year 2006 for all subsidiary companies, all parent companies, all subsidiaries of the parent companies, and all joint venture partners.

(iii) The refiner had a corporate-average crude oil capacity less than or equal to 155,000 barrels per calendar day (bpcd) for 2006.

(2) For the purposes of this section, the term “refiner” shall include foreign refiners.

(3) Refiners who qualified as small under 40 CFR 80.1142 do not need to re-apply for small refiner status under this subpart M. This paragraph (a) does not supersede § 80.1142.

(b)(1) The small refiner exemption in paragraph (c) of this section is effective immediately, except as provided in paragraph (b)(5) of this section, provided that all requirements of this section are satisfied.

(2) Refiners who qualify for the small refiner exemption under paragraph (a) of this section must submit a verification letter (and any other relevant information) to EPA by July 1, 2010. The small refiner verification letter must include all of the following information for the refiner and for all subsidiary companies, all parent companies, all subsidiaries of the parent companies, and all joint venture partners:

(i) A listing of the name and address of each company location where any employee worked for the period January 1, 2006 through December 31, 2006.

(ii) The average number of employees at each location based on the number of employees for each pay period for the period January 1, 2006 through December 31, 2006.

(iii) The type of business activities carried out at each location.

(iv) For joint ventures, the total number of employees includes the combined employee count of all corporate entities in the venture.

(v) For government-owned refiners, the total employee count includes all government employees.

(vi) The total corporate crude oil capacity of each refinery as reported to the Energy Information Administration (EIA) of the U.S. Department of Energy (DOE), for the period January 1, 2006 through December 31, 2006. The information submitted to EIA is presumed to be correct. In cases where a company disagrees with this information, the company may petition EPA with appropriate data to correct the record when the company submits its application.

(vii) The verification letter must be signed by the president, chief operating or chief executive officer of the company, or his/her designee, stating that the information is true to the best of his/her knowledge, and that the company owned the refinery as of December 31, 2006.

(viii) Name, address, phone number, facsimile number, and e-mail address of a corporate contact person.

(3) In the case of a refiner who acquires or reactivates a refinery that was shutdown or non-operational between January 1, 2005 and January 1,

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petition that corrects the omission may be re-submitted for EPA review.

(4) If the fuel or pathway described in the petition does not meet the definitions in §80.1401 of renewable fuel, advanced biofuel, cellulosic biofuel, or biomass-based diesel, then EPA will notify the applicant in writing that the petition is denied and will not be reviewed further.

(d) A D code must be approved prior to the generation of RINs for the fuel in question. During petition review EPA will evaluate whether a feedstock meets the 75% cellulosic content threshold allowing cellulosic RINs to be generated for the entire fuel volume produced. The Administrator may ask for additional information to complete this evaluation.

(e) The petition under this section shall be submitted on forms and following procedures as prescribed by EPA.

[75 FR 26037, May 10, 2010, as amended at 79 FR 42160, July 18, 2014]

§§ 80.1417–80.1424 [Reserved]**§ 80.1425 Renewable Identification Numbers (RINs).**

RINs generated on or after July 1, 2010 shall not be generated as a 38-digit code, but shall be identified by the information specified in paragraphs (a) through (i) of this section and introduced into EMTS as data elements during the generation of RINs pursuant to §80.1452(b). For RINs generated prior to July 1, 2010, each RIN is a 38-digit code of the following form:

YYYYYCCCCFFFFFBBBBBRRD

SSSSSSSSEEEEEEEE

(a) K is a number identifying the type of RIN as follows:

(1) K has the value of 1 when the RIN is assigned to a volume of renewable fuel pursuant to §80.1426(e) and §80.1428(a).

(2) K has the value of 2 when the RIN has been separated from a volume of renewable fuel pursuant to §80.1429.

(b) YYYY is the calendar year in which the RIN was generated.

(c) CCCC is the registration number assigned, according to §80.1450, to the

producer or importer of the batch of renewable fuel.

(d) FFFFFF is the registration number assigned, according to §80.1450, to the facility at which the batch of renewable fuel was produced or imported.

(e) BBBBBB is a serial number assigned to the batch which is chosen by the producer or importer of the batch such that no two batches have the same value in a given calendar year.

(f) RR is a number representing 10 times the equivalence value of the renewable fuel as specified in §80.1415.

(g) D is a number determined according to §80.1426(f) and identifying the type of renewable fuel, as follows:

(1) D has the value of 3 to denote fuel categorized as cellulosic biofuel.

(2) D has the value of 4 to denote fuel categorized as biomass-based diesel.

(3) D has the value of 5 to denote fuel categorized as advanced biofuel.

(4) D has the value of 6 to denote fuel categorized as renewable fuel.

(5) D has the value of 7 to denote fuel categorized as cellulosic diesel.

(h) SSSSSSSS is a number representing the first gallon-RIN associated with a batch of renewable fuel.

(i) EEEEEEEE is a number representing the last gallon-RIN associated with a volume of renewable fuel.

[75 FR 14863, Mar. 26, 2010, as amended at 75 FR 79977, Dec. 21, 2010]

§ 80.1426 How are RINs generated and assigned to batches of renewable fuel by renewable fuel producers or importers?

(a) *General requirements.* (1) To the extent permitted under paragraphs (b) and (c) of this section, producers and importers of renewable fuel must generate RINs to represent that fuel if all of the following occur:

(i) The fuel qualifies for a D code pursuant to §80.1426(f), or the EPA has approved a petition for use of a D code pursuant to §80.1416.

(ii) The fuel is demonstrated to be produced from renewable biomass pursuant to the reporting requirements of §80.1451 and the recordkeeping requirements of §80.1454.

(A) Feedstocks meeting the requirements of renewable biomass through the aggregate compliance provision at

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§80.1454(g) are deemed to be renewable biomass.

(B) [Reserved]

(iii) Was produced in compliance with the registration requirements of §80.1450, the reporting requirements of §80.1451, the recordkeeping requirements of §80.1454, and all other applicable requirements of this subpart M.

(iv) The renewable fuel is designated on a product transfer document (PTD) for use as transportation fuel, heating oil, or jet fuel in accordance with §80.1453(a)(12).

(2) To generate RINs for imported renewable fuel, including any renewable fuel contained in imported transportation fuel, heating oil, or jet fuel, importers must obtain information from a foreign producer that is registered pursuant to §80.1450 sufficient to make the appropriate determination regarding the applicable D code and compliance with the renewable biomass definition for each imported batch for which RINs are generated.

(3) A party generating a RIN shall specify the appropriate numerical values for each component of the RIN in accordance with the provisions of §80.1425(a) and paragraph (f) of this section.

(b) *Regional applicability.* (1) Except as provided in paragraph (c) of this section, a RIN must be generated by a renewable fuel producer or importer for a batch of renewable fuel that satisfies the requirements of paragraph (a)(1) of this section if it is produced or imported for use as transportation fuel, heating oil, or jet fuel in the 48 contiguous states or Hawaii.

(2) If the Administrator approves a petition of Alaska or a United States territory to opt-in to the renewable fuel program under the provisions in §80.1443, then the requirements of paragraph (b)(1) of this section shall also apply to renewable fuel produced or imported for use as transportation fuel, heating oil, or jet fuel in that state or territory beginning in the next calendar year.

(c) *Cases in which RINs are not generated.* (1) Fuel producers and importers may not generate RINs for fuel that does not satisfy the requirements of paragraph (a)(1) of this section.

(2) *Small producer/importer threshold.* Pursuant to §80.1455(a) and (b), renewable fuel producers that produce less than 10,000 gallons a year of renewable fuel, and importers that import less than 10,000 gallons a year of renewable fuel, are not required to generate and assign RINs to batches of renewable fuel that satisfy the requirements of paragraph (a)(1) of this section that they produce or import.

(3) *Temporary new producer threshold.* Pursuant to §80.1455(c) and (d), new renewable fuel producers that produce less than 125,000 gallons of renewable fuel a year are not required to generate and assign RINs to batches of renewable fuel to satisfy the requirements of paragraph (a)(1) of this section.

(i) The provisions of this paragraph (c)(3) apply only to new facilities, for a maximum of three years beginning with the calendar year in which the production facility produces its first gallon of renewable fuel.

(ii) [Reserved]

(4) Importers shall not generate RINs for renewable fuel imported from a foreign renewable fuel producer, or for renewable fuel made with ethanol produced by a foreign ethanol producer, unless the foreign renewable fuel producer or foreign ethanol producer is registered with EPA as required in §80.1450.

(5) Importers shall not generate RINs for renewable fuel that has already been assigned RINs by a registered foreign producer.

(6) A party is prohibited from generating RINs for a volume of fuel that it produces if the fuel has been produced by a process that uses a renewable fuel as a feedstock, and the renewable fuel that is used as a feedstock was produced by another party, except that RINs may be generated for such fuel if allowed by the EPA in response to a petition submitted pursuant to §80.1416 and the petition approval specifies a mechanism to prevent double counting of RINs.

(7) For renewable fuel oil that is heating oil as defined in paragraph (2) of the definition of heating oil in §80.1401, renewable fuel producers and importers shall not generate RINs unless they have received affidavits from

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the final end user or users of the fuel oil as specified in § 80.1451(b)(1)(ii)(T)(2).

(d)(1) *Definition of batch.* For the purposes of this section and § 80.1425, a “batch of renewable fuel” is a volume of renewable fuel that has been assigned a unique identifier within a calendar year by the producer or importer of the renewable fuel in accordance with the provisions of this section and § 80.1425.

(i) The number of gallon-RINs generated for a batch of renewable fuel may not exceed 99,999,999.

(ii) A batch of renewable fuel cannot represent renewable fuel produced or imported in excess of one calendar month.

(2) Multiple gallon-RINs generated to represent a given volume of renewable fuel can be represented by a single batch-RIN through the appropriate designation of the RIN volume codes SSSSSSSS and EEEEEEEE.

(i) The value of SSSSSSSS in the batch-RIN shall be 00000001 to represent the first gallon-RIN associated with the volume of renewable fuel.

(ii) The value of EEEEEEEE in the batch-RIN shall represent the last gallon-RIN associated with the volume of renewable fuel, based on the RIN volume V_{RIN} determined pursuant to paragraph (f) of this section.

(iii) Under § 80.1452, RIN volumes will be managed by EMTS. RIN codes SSSSSSSS and EEEEEEEE do not have a role in EMTS.

(e) *Assignment of RINs to batches*—(1) Except as provided in paragraph (g) of this section for delayed RINs, the producer or importer of renewable fuel must assign all RINs generated to volumes of renewable fuel.

(2) A RIN is assigned to a volume of renewable fuel when ownership of the RIN is transferred along with the transfer of ownership of the volume of renewable fuel, pursuant to § 80.1428(a).

(3) All assigned RINs shall have a K code value of 1.

(f) *Generation of RINs*—(1) *Applicable pathways.* D codes shall be used in RINs generated by producers or importers of renewable fuel according to the pathways listed in Table 1 to this section, paragraph (f)(6) of this section, or as approved by the Administrator. In choosing an appropriate D code, producers and importers may disregard any incidental, *de minimis* feedstock contaminants that are impractical to remove and are related to customary feedstock production and transport. Tables 1 and 2 to this section do not apply to, and impose no requirements with respect to, volumes of fuel for which RINs are generated pursuant to paragraph (f)(6) of this section.

TABLE 1 TO § 80.1426—APPLICABLE D CODES FOR EACH FUEL PATHWAY FOR USE IN GENERATING RINs

	Fuel type	Feedstock	Production process requirements	D-Code
A	Ethanol	Corn starch	All of the following: Dry mill process, using natural gas, biomass, or biogas for process energy and at least two advanced technologies from Table 2 to this section.	6
B	Ethanol	Corn starch	All of the following: Dry mill process, using natural gas, biomass, or biogas for process energy and at least one of the advanced technologies from Table 2 to this section plus drying no more than 65% of the distillers grains with solubles it markets annually.	6
C	Ethanol	Corn starch	All of the following: Dry mill process, using natural gas, biomass, or biogas for process energy and drying no more than 50% of the distillers grains with solubles it markets annually.	6
D	Ethanol	Corn starch	Wet mill process using biomass or biogas for process energy.	6
E	Ethanol	Starches from crop residue and annual covercrops.	Fermentation using natural gas, biomass, or biogas for process energy.	6

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TABLE 1 TO § 80.1426—APPLICABLE D CODES FOR EACH FUEL PATHWAY FOR USE IN GENERATING RINS—Continued

	Fuel type	Feedstock	Production process requirements	D-Code
F	Biodiesel, renewable diesel, jet fuel and heating oil.	Soy bean oil; Oil from annual covercrops; Oil from algae grown photosynthetically; Biogenic waste oils/fats/greases; Non-food grade corn oil; Camelina sativa oil..	One of the following: Trans-Esterification Hydrotreating Excluding processes that co-process renewable biomass and petroleum..	4
G	Biodiesel, heating oil.	Canola/Rapeseed oil	Trans-Esterification using natural gas or biomass for process energy.	4
H	Biodiesel, renewable diesel, jet fuel and heating oil.	Soy bean oil; Oil from annual covercrops; Oil from algae grown photosynthetically; Biogenic waste oils/fats/greases; Non-food grade corn oil; Camelina sativa oil..	One of the following: Trans-Esterification Hydrotreating includes only processes that co-process renewable biomass and petroleum..	5
I	Naphtha, LPG ..	Camelina sativa oil	Hydrotreating	5
J	Ethanol	Sugarcane	Fermentation	5
K	Ethanol	Crop residue, slash, pre-commercial thinnings and tree residue, switchgrass, miscanthus, energy cane, Arundo donax, Pennisetum purpureum, and separated yard waste; biogenic components of separated MSW; cellulosic components of separated food waste; and cellulosic components of annual cover crops.	Any process that converts cellulosic biomass to fuel.	3
L	Cellulosic diesel, jet fuel and heating oil.	Crop residue, slash, pre-commercial thinnings and tree residue, switchgrass, miscanthus, energy cane, Arundo donax, Pennisetum purpureum, and separated yard waste; biogenic components of separated MSW; cellulosic components of separated food waste; and cellulosic components of annual cover crops.	Any process that converts cellulosic biomass to fuel.	7
M	Renewable gasoline and renewable gasoline blendstock.	Crop residue, slash, pre-commercial thinnings, tree residue, and separated yard waste; biogenic components of separated MSW; cellulosic components of separated food waste; and cellulosic components of annual cover crops.	Catalytic Pyrolysis and Upgrading, Gasification and Upgrading, Thermo-Catalytic Hydrodeoxygenation and Upgrading, Direct Biological Conversion, Biological Conversion and Upgrading utilizing natural gas, biogas, and/or biomass as the only process energy sources providing that process used converts cellulosic biomass to fuel; any process utilizing biogas and/or biomass as the only process energy sources which converts cellulosic biomass to fuel.	3
N	Naphtha	Switchgrass, miscanthus, energy cane, Arundo donax, and Pennisetum purpureum.	Gasification and upgrading processes that converts cellulosic biomass to fuel.	3
O	Butanol	Corn starch	Fermentation; dry mill using natural gas, biomass, or biogas for process energy.	6
P	Ethanol, renewable diesel, jet fuel, heating oil, and naphtha.	The non-cellulosic portions of separated food waste and non-cellulosic components of annual cover crops.	Any	5
Q	Renewable Compressed Natural Gas, Renewable Liquefied Natural Gas, Renewable Electricity.	Biogas from landfills, municipal wastewater treatment facility digesters, agricultural digesters, and separated MSW digesters; and biogas from the cellulosic components of biomass processed in other waste digesters.	Any	3
R	Ethanol	Grain Sorghum	Dry mill process using biogas from landfills, waste treatment plants, and/or waste digesters, and/or natural gas, for process energy.	6

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TABLE 1 TO § 80.1426—APPLICABLE D CODES FOR EACH FUEL PATHWAY FOR USE IN GENERATING RINS—Continued

	Fuel type	Feedstock	Production process requirements	D-Code
S	Ethanol	Grain Sorghum	Dry mill process, using only biogas from landfills, waste treatment plants, and/or waste digesters for process energy and for on-site production of all electricity used at the site other than up to 0.15 kWh of electricity from the grid per gallon of ethanol produced, calculated on a per batch basis.	5
T	Renewable Compressed Natural Gas, Renewable Liquefied Natural Gas, and Renewable Electricity.	Biogas from waste digesters	Any	5

TABLE 2 TO § 80.1426—ADVANCED TECHNOLOGIES

Corn oil fractionation that is applied to at least 90% of the corn used to produce ethanol on a calendar year basis.

Corn oil extraction that is applied to the whole stillage and/or derivatives of whole stillage and results in recovery of corn oil at an annual average rate equal to or greater than 1.33 pounds oil per bushel of corn processed into ethanol.

Membrane separation in which at least 90% of ethanol dehydration is carried out using a hydrophilic membrane on a calendar year basis.

Raw starch hydrolysis that is used for at least 90% of starch hydrolysis used to produce ethanol instead of hydrolysis using a traditional high heat cooking process, calculated on a calendar year basis.

Combined heat and power such that, on a calendar year basis, at least 90% of the thermal energy associated with ethanol production (including thermal energy produced at the facility and that which is derived from an off-site waste heat supplier), exclusive of any thermal energy used for the drying of distillers grains and solubles, is used to produce electricity prior to being used to meet the process heat requirements of the facility.

(2) *Renewable fuel that can be described by a single pathway.*

(i) The number of gallon-RINs that shall be generated for a batch of renewable fuel by a producer or importer for renewable fuel that can be described by a single pathway shall be equal to a

volume calculated according to the following formula:

$$V_{\text{RIN}} = \text{EV} * V_s$$

Where:

V_{RIN} = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for the batch.

EV = Equivalence value for the batch of renewable fuel per § 80.1415.

V_s = Standardized volume of the batch of renewable fuel at 60 °F, in gallons, calculated in accordance with paragraph (f)(8) of this section.

(ii) The D code that shall be used in the RINs generated shall be the D code specified in Table 1 to this section, or a D code as approved by the Administrator, which corresponds to the pathway that describes the producer's operations.

(3) *Renewable fuel that can be described by two or more pathways.* (i) The D codes that shall be used in the RINs generated by a producer or importer whose renewable fuel can be described by two or more pathways shall be the D codes specified in Table 1 to this section, or D codes as approved by the Administrator, which correspond to the pathways that describe the renewable fuel throughout that calendar year.

(ii) If all the pathways describing the producer's operations have the same D code and each batch is of a single fuel type, then that D code shall be used in all the RINs generated and the number of gallon-RINs that shall be generated for a batch of renewable fuel shall be equal to a volume calculated according to the following formula:

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$$V_{\text{RIN}} = \text{EV} * V_s$$

Where:

V_{RIN} = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for the batch.

EV = Equivalence value for the batch of renewable fuel per §80.1415.

V_s = Standardized volume of the batch of renewable fuel at 60 °F, in gallons, calculated in accordance with paragraph (f)(8) of this section.

(iii) If all the pathways describing the producer's operations have the same D code but individual batches are comprised of a mixture of fuel types with different equivalence values, then that D code shall be used in all the RINs generated and the number of gallon-RINs that shall be generated for a batch of renewable fuel shall be equal to a volume calculated according to the following formula:

$$V_{\text{RIN}} = \Sigma(\text{EV}_i * V_{s,i})$$

Where:

V_{RIN} = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for the batch.

EV_i = Equivalence value for fuel type i in the batch of renewable fuel per §80.1415.

$V_{s,i}$ = Standardized volume of fuel type i in the batch of renewable fuel at 60 °F, in gallons, calculated in accordance with paragraph (f)(8) of this section.

(iv) If the pathway applicable to a producer changes on a specific date, such that one pathway applies before the date and another pathway applies on and after the date, and each batch is of a single fuel type, then the applicable D code and batch identifier used in generating RINs must change on the date that the change in pathway occurs and the number of gallon-RINs that shall be generated for a batch of renewable fuel shall be equal to a volume calculated according to the following formula:

$$V_{\text{RIN}} = \text{EV} * V_s$$

Where:

V_{RIN} = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for a batch with a single applicable D code.

EV = Equivalence value for the batch of renewable fuel per §80.1415.

V_s = Standardized volume of the batch of renewable fuel at 60 °F, in gallons, calculated in accordance with paragraph (f)(8) of this section.

(v) If a producer produces batches that are comprised of a mixture of fuel types with different equivalence values and different applicable D codes, then separate values for V_{RIN} shall be calculated for each category of renewable fuel according to formulas in Table 3 to this section. All batch-RINs thus generated shall be assigned to unique batch identifiers for each portion of the batch with a different D code.

TABLE 3 TO § 80.1426—NUMBER OF GALLON-RINs TO ASSIGN TO BATCH-RINs WITH D CODES DEPENDENT ON FUEL TYPE

D code to use in batch-RIN	Number of gallon-RINs
D = 3	$V_{\text{RIN, CB}} = \text{EV}_{\text{CB}} * V_{s, \text{CB}}$
D = 4	$V_{\text{RIN, BBD}} = \text{EV}_{\text{BBD}} * V_{s, \text{BBD}}$
D = 5	$V_{\text{RIN, AB}} = \text{EV}_{\text{AB}} * V_{s, \text{AB}}$
D = 6	$V_{\text{RIN, RF}} = \text{EV}_{\text{RF}} * V_{s, \text{RF}}$
D = 7	$V_{\text{RIN, CD}} = \text{EV}_{\text{CD}} * V_{s, \text{CD}}$

Where:

$V_{\text{RIN, CB}}$ = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for the cellulosic biofuel portion of the batch with a D code of 3.

$V_{\text{RIN, BBD}}$ = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for the biomass-based diesel portion of the batch with a D code of 4.

$V_{\text{RIN, AB}}$ = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for the advanced biofuel portion of the batch with a D code of 5.

$V_{\text{RIN, RF}}$ = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for the renewable fuel portion of the batch with a D code of 6.

$V_{\text{RIN, CD}}$ = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for the cellulosic diesel portion of the batch with a D code of 7.

EV_{CB} = Equivalence value for the cellulosic biofuel portion of the batch per §80.1415.

EV_{BBD} = Equivalence value for the biomass-based diesel portion of the batch per §80.1415.

EV_{AB} = Equivalence value for the advanced biofuel portion of the batch per §80.1415.

EV_{RF} = Equivalence value for the renewable fuel portion of the batch per §80.1415.

EV_{CD} = Equivalence value for the cellulosic diesel portion of the batch per §80.1415.

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$V_{s,CB}$ = Standardized volume at 60 °F of the portion of the batch that must be assigned a D code of 3, in gallons, calculated in accordance with paragraph (f)(8) of this section.

$V_{s,BBD}$ = Standardized volume at 60 °F of the portion of the batch that must be assigned a D code of 4, in gallons, calculated in accordance with paragraph (f)(8) of this section.

$V_{s,AB}$ = Standardized volume at 60 °F of the portion of the batch that must be assigned a D code of 5, in gallons, calculated in accordance with paragraph (f)(8) of this section.

$V_{s,RF}$ = Standardized volume at 60 °F of the portion of the batch that must be assigned a D code of 6, in gallons, calculated in accordance with paragraph (f)(8) of this section.

$V_{s,CD}$ = Standardized volume at 60 °F of the portion of the batch that must be assigned a D code of 7, in gallons, calculated in accordance with paragraph (f)(8) of this section.

(vi) If a producer produces a single type of renewable fuel using two or more different feedstocks which are processed simultaneously, and each batch is comprised of a single type of fuel, then the number of gallon-RINs that shall be generated for a batch of renewable fuel and assigned a particular D code shall be determined according to the formulas in Table 4 to this section.

Table 4 to §80.1426
Number of gallon-RINs to assign to batch-RINs with D codes dependent on feedstock

D code to use in batch-RIN	Number of gallon-RINs
D = 3	$V_{RIN,CB} = EV * V_s * \frac{FE_3}{FE_3 + FE_4 + FE_5 + FE_6 + FE_7}$
D = 4	$V_{RIN,BBD} = EV * V_s * \frac{FE_4}{FE_3 + FE_4 + FE_5 + FE_6 + FE_7}$
D = 5	$V_{RIN,AB} = EV * V_s * \frac{FE_5}{FE_3 + FE_4 + FE_5 + FE_6 + FE_7}$
D = 6	$V_{RIN,RF} = EV * V_s * \frac{FE_6}{FE_3 + FE_4 + FE_5 + FE_6 + FE_7}$
D = 7	$V_{RIN,CD} = EV * V_s * \frac{FE_7}{FE_3 + FE_4 + FE_5 + FE_6 + FE_7}$

Where:

$V_{RIN,CB}$ = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for a batch of cellulosic biofuel with a D code of 3.

$V_{RIN,BBD}$ = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for a batch of biomass-based diesel with a D code of 4.

$V_{RIN,AB}$ = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for a batch of advanced biofuel with a D code of 5.

$V_{RIN,RF}$ = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for a batch of renewable fuel with a D code of 6.

$V_{RIN,CD}$ = RIN volume, in gallons, for use in determining the number of gallon-RINs

that shall be generated for a batch of cellulosic diesel with a D code of 7.

EV = Equivalence value for the renewable fuel per §80.1415.

V_s = Standardized volume of the batch of renewable fuel at 60 °F, in gallons, calculated in accordance with paragraph (f)(8) of this section.

FE_3 = Feedstock energy from all feedstocks whose pathways have been assigned a D code of 3 under Table 1 to this section, or a D code of 3 as approved by the Administrator, in Btu.

FE_4 = Feedstock energy from all feedstocks whose pathways have been assigned a D code of 4 under Table 1 to this section, or a D code of 4 as approved by the Administrator, in Btu.

FE_5 = Feedstock energy from all feedstocks whose pathways have been assigned a D

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code of 5 under Table 1 to this section, or a D code of 5 as approved by the Administrator, in Btu.

FE_6 = Feedstock energy from all feedstocks whose pathways have been assigned a D code of 6 under Table 1 to this section, or a D code of 6 as approved by the Administrator, in Btu.

FE_7 = Feedstock energy from all feedstocks whose pathways have been assigned a D code of 7 under Table 1 to this section, or a D code of 7 as approved by the Administrator, in Btu.

Feedstock energy values, FE, shall be calculated according to the following formula:

$$FE = M * (1 - m) * CF * E$$

Where:

FE = Feedstock energy, in Btu.

M = Mass of feedstock, in pounds, measured on a daily or per-batch basis.

m = Average moisture content of the feedstock, in mass percent.

CF = Converted Fraction in annual average mass percent, except as otherwise provided by §80.1451(b)(1)(ii)(U), representing that portion of the feedstock that is converted into renewable fuel by the producer.

E = Energy content of the components of the feedstock that are converted to renewable fuel, in annual average Btu/lb, determined according to paragraph (f)(7) of this section.

(4) *Renewable fuel that is produced by co-processing renewable biomass and non-renewable feedstocks simultaneously to produce a fuel that is partially renewable.* (i) The number of gallon-RINs that shall be generated for a batch of partially renewable fuel shall be equal to a volume V_{RIN} calculated according to Method A or Method B.

(A) *Method A.* (1) V_{RIN} shall be calculated according to the following formula:

$$V_{RIN} = EV * V_s * FE_R / (FE_R + FE_{NR})$$

Where:

V_{RIN} = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for the batch.

EV = Equivalence value for the batch of renewable fuel per §80.1415, subject to qualification in paragraph (f)(4)(iii) of this section.

V_s = Standardized volume of the batch of renewable fuel at 60 °F, in gallons, calculated in accordance with paragraph (f)(8) of this section.

FE_R = Feedstock energy from renewable biomass used to make the transportation fuel, in Btu.

FE_{NR} = Feedstock energy from non-renewable feedstocks used to make the transportation fuel, heating oil, or jet fuel, in Btu.

(2) The value of FE for use in paragraph (f)(4)(i)(A)(I) of this section shall be calculated from the following formula:

$$FE = M * (1 - m) * CF * E$$

Where:

FE = Feedstock energy, in Btu.

M = Mass of feedstock, in pounds, measured on a daily or per-batch basis.

m = Average moisture content of the feedstock, in mass percent.

CF = Converted Fraction in annual average mass percent, except as otherwise provided by §80.1451(b)(1)(ii)(U), representing that portion of the feedstock that is converted into transportation fuel, heating oil, or jet fuel by the producer.

E = Energy content of the components of the feedstock that are converted to fuel, in annual average Btu/lb, determined according to paragraph (f)(7) of this section.

(B) *Method B.* V_{RIN} shall be calculated according to the following formula:

$$V_{RIN} = EV * V_s * R$$

Where:

V_{RIN} = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for the batch.

EV = Equivalence value for the batch of renewable fuel per §80.1415, subject to qualification in paragraph (f)(4)(iii) of this section.

V_s = Standardized volume of the batch of renewable fuel at 60 °F, in gallons, calculated in accordance with paragraph (f)(8) of this section.

R = The renewable fraction of the fuel as measured by a carbon-14 dating test method as provided in paragraph (f)(9) of this section.

(ii) The D code that shall be used in the RINs generated to represent partially renewable transportation fuel, heating oil, or jet fuel shall be the D code specified in Table 1 to this section, or a D code as approved by the Administrator, which corresponds to the pathway that describes a producer's operations. In determining the appropriate pathway, the contribution

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of non-renewable feedstocks to the production of partially renewable fuel shall be ignored.

(iii) In determining the RIN volume V_{RIN} according to paragraph (f)(4)(i)(A) or (f)(4)(i)(B) of this section, the equivalence value used to determine V_{RIN} which is calculated according to § 80.1415 shall use a value of 1.0 to represent R, the renewable content of the renewable fuel.

(5) *Renewable fuel produced from separated yard and food waste.*(i) *Separated yard waste and food waste* means, for the purposes of this section, waste that is one of the following:

(A) *Separated yard waste*, which is a feedstock stream consisting of yard waste kept separate since generation from other waste materials. Separated yard waste is deemed to be composed entirely of cellulosic materials.

(B) *Separated food waste*, which is a feedstock stream consisting of food waste kept separate since generation from other waste materials, and which includes food and beverage production waste and post-consumer food and beverage waste. Separated food waste is deemed to be composed entirely of non-cellulosic materials, unless a party demonstrates that a portion of the feedstock is cellulosic through approval of their facility registration.

(C) *Separated municipal solid waste (separated MSW)*, which is material remaining after separation actions have been taken to remove recyclable paper, cardboard, plastics, rubber, textiles, metals, and glass from municipal solid waste, and which is composed of both cellulosic and non-cellulosic materials.

(ii) (A) A feedstock qualifies under paragraph (f)(5)(i)(A) or (f)(5)(i)(B) of this section only if it is collected according to a plan submitted to and accepted by U.S. EPA under the registration procedures specified in § 80.1450(b)(1)(vii).

(B) A feedstock qualifies under paragraph (f)(5)(i)(C) of this section only if it is collected according to a plan submitted to and approved by U.S. EPA.

(iii) Separation and recycling actions specified in paragraph (f)(5)(i)(C) of this section are considered to occur if:

(A) Recyclable paper, cardboard, plastics, rubber, textiles, metals, and glass that can be recycled are separated

and removed from the municipal solid waste stream to the extent reasonably practicable according to a plan submitted to and approved by U.S. EPA under the registration procedures specified in § 80.1450(b)(1)(viii); and

(B) The fuel producer has evidence of all contracts relating to the disposition of paper, cardboard, plastics, rubber, textiles, metals, and glass that are recycled.

(iv)(A) The number of gallon-RINs that shall be generated for a batch of renewable fuel derived from separated yard waste as defined in paragraph (f)(5)(i)(A) of this section shall be equal to a volume V_{RIN} and is calculated according to the following formula:

$$V_{RIN} = EV * V_s$$

Where:

V_{RIN} = RIN volume, in gallons, for use in determining the number of cellulosic biofuel gallon-RINs that shall be generated for the batch.

EV = Equivalence value for the batch of renewable fuel per § 80.1415.

V_s = Standardized volume of the batch of renewable fuel at 60 °F, in gallons, calculated in accordance with paragraph (f)(8) of this section.

(B) The number of gallon-RINs that shall be generated for a batch of renewable fuel derived from separated food waste as defined in paragraph (f)(5)(i)(B) of this section shall be equal to a volume V_{RIN} and is calculated according to the following formula:

$$V_{RIN} = EV * V_s$$

Where:

V_{RIN} = RIN volume, in gallons, for use in determining the number of cellulosic or advanced biofuel gallon-RINs that shall be generated for the batch.

EV = Equivalence value for the batch of renewable fuel per § 80.1415.

V_s = Standardized volume of the batch of renewable fuel at 60 °F, in gallons, calculated in accordance with paragraph (f)(8) of this section.

(v) The number of cellulosic biofuel gallon-RINs that shall be generated for the cellulosic portion of a batch of renewable fuel derived from separated MSW as defined in paragraph (f)(5)(i)(C) of this section shall be determined according to the following formula:

$$V_{RIN} = EV * V_s * R$$

Where:

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V_{RIN} = RIN volume, in gallons, for use in determining the number of cellulosic biofuel gallon-RINs that shall be generated for the batch.

EV = Equivalence value for the batch of renewable fuel per § 80.1415.

V_s = Standardized volume of the batch of renewable fuel at 60 °F, in gallons, calculated in accordance with paragraph (f)(8) of this section.

R = The calculated non-fossil fraction of the fuel as measured by a carbon-14 dating test method as provided in paragraph (f)(9) of this section, except that for biogas-derived fuels made from separated MSW, no testing is required and $R = 1$.

(vi) The D code that shall be used in the RINs generated to represent separated yard waste, food waste, and MSW shall be the D code specified in Table 1 to this section, or a D code as approved by the Administrator, which corresponds to the pathway that describes the producer's operations and feedstocks.

(6) *Renewable fuel neither covered by the pathways in Table 1 to this section, nor given an approval by the Administrator for use of a specific D code.* If none of the pathways described in Table 1 to this section apply to a producer's operations, and the producer has not received approval for the use of a specific D code by the Administrator, the party may generate RINs if the fuel from its facility is made from renewable biomass and qualifies for an exemption under § 80.1403 from the requirement that renewable fuel achieve at least a 20 percent reduction in lifecycle greenhouse gas emissions compared to baseline lifecycle greenhouse gas emissions.

(i) The number of gallon-RINs that shall be generated for a batch of renewable fuel that qualifies for an exemption from the 20 percent GHG reduction requirements under § 80.1403 shall be equal to a volume calculated according to the following formula:

$$V_{RIN} = EV * V_s$$

Where:

V_{RIN} = RIN volume, in gallons, for use in determining the number of gallon-RINs that shall be generated for the batch.

EV = Equivalence value for the batch of renewable fuel per § 80.1415.

V_s = Standardized volume of the batch of renewable fuel at 60 °F, in gallons, calculated in accordance with paragraph (f)(8) of this section.

(ii) A D code of 6 shall be used in the RINs generated under this paragraph (f)(6).

(7) *Determination of feedstock energy content factors.* (i) For purposes of paragraphs (f)(3)(vi) and (f)(4)(i)(A)(2) of this section, producers must specify the value for E, the energy content of the components of the feedstock that are converted to renewable fuel, used in the calculation of the feedstock energy value FE.

(ii) The value for E shall represent the higher or gross calorific heating value for a feedstock on a zero moisture basis.

(iii) Producers must specify the value for E for each type of feedstock at least once per calendar year.

(iv) A producer must use default values for E as provided in paragraph (f)(7)(vi) of this section, or must determine alternative values for its own feedstocks according to paragraph (f)(7)(v) of this section.

(v) Producers that do not use a default value for E must use the following test methods, or alternative test methods as approved by EPA, to determine the value of E. The value of E shall be based upon the test results of a sample of feedstock that, based upon good engineering judgment, is representative of the feedstocks used to produce renewable fuel:

(A) ASTM E 870 or ASTM E 711 for gross calorific value (both incorporated by reference, see § 80.1468).

(B) ASTM D 4442 or ASTM D 4444 for moisture content (both incorporated by reference, see § 80.1468).

(vi) *Default values for E.*

(A) Starch: 7,600 Btu/lb.

(B) Sugar: 7,300 Btu/lb.

(C) Vegetable oil: 17,000 Btu/lb.

(D) Waste cooking oil or trap grease: 16,600 Btu/lb.

(E) Tallow or fat: 16,200 Btu/lb.

(F) Manure: 6,900 Btu/lb.

(G) Woody biomass: 8,400 Btu/lb.

(H) Herbaceous biomass: 7,300 Btu/lb.

(I) Yard wastes: 2,900 Btu/lb.

(J) Biogas: 11,000 Btu/lb.

(K) Food waste: 2,000 Btu/lb.

(L) Paper: 7,200 Btu/lb.

(M) Crude oil: 19,100 Btu/lb.

(N) Coal—bituminous: 12,200 Btu/lb.

(O) Coal—anthracite: 13,300 Btu/lb.

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(P) Coal—lignite or sub-bituminous: 7,900 Btu/lb.

(Q) Natural gas: 19,700 Btu/lb.

(R) Tires or rubber: 16,000 Btu/lb.

(S) Plastic: 19,000 Btu/lb.

(8) *Standardization of volumes.* In determining the standardized volume of a batch of renewable fuel for purposes of generating RINs under this paragraph (f), the batch volumes shall be adjusted to a standard temperature of 60 °F.

(i) For ethanol, the following formula shall be used:

$$V_{s,e} = V_{a,e} * (-0.0006301 * T + 1.0378)$$

Where:

$V_{s,e}$ = Standardized volume of ethanol at 60 °F, in gallons.

$V_{a,e}$ = Actual volume of ethanol, in gallons.

T = Actual temperature of the batch, in °F.

(ii) For biodiesel (mono-alkyl esters), one of the following two methods for biodiesel temperature standardization to 60 °Fahrenheit (°F) shall be used

$$(A) V_{s,b} = V_{a,b} * (-0.00045767 * T + 1.02746025)$$

Where

$V_{s,b}$ = Standardized volume of biodiesel at 60 °F, in gallons.

$V_{a,b}$ = Actual volume of biodiesel, in gallons.

T = Actual temperature of the batch, in °F.

(B) The standardized volume of biodiesel at 60 °F, in gallons, as calculated from the use of the American Petroleum Institute Refined Products Table 6B, as referenced in ASTM D 1250 (incorporated by reference, see § 80.1468).

(iii) For other renewable fuels, an appropriate formula commonly accepted by the industry shall be used to standardize the actual volume to 60 °F. Formulas used must be reported to EPA, and may be determined to be inappropriate.

(9) *Use of radiocarbon dating test methods.*(i) Parties may use a radiocarbon dating test method for determination of the renewable fraction of a fuel R used to determine V_{RIN} as provided in paragraphs (f)(4) and (f)(5) of this section.

(ii) Parties must use Method B or Method C of ASTM D 6866 (incorporated by reference, see § 80.1468), or an alternative test method as approved by EPA.

(iii) For each batch of fuel, the value of R must be based on:

(A) A radiocarbon dating test of the batch of fuel produced; or

(B) A radiocarbon dating test of a composite sample of previously produced fuel, if all of the following conditions are met:

(1) Based upon good engineering judgment, the renewable fraction of the composite sample must be representative of the batch of fuel produced.

(2) The composite sample is comprised of a volume weighted combination of samples from every batch of partially renewable transportation fuel produced by the party over a period not to exceed one calendar month, or more frequently if necessary to ensure that the test results are representative of the renewable fraction of the partially renewable fuel.

(3) The composite sample must be well mixed prior to testing.

(4) A volume of each composite sample must be retained for a minimum of two years, and be of sufficient volume to permit two additional tests to be conducted.

(iv) If the party is using the composite sampling approach according to paragraph (f)(9)(iii)(B) of this section, the party may estimate the value of R for use in generating RINs in the first month if all of the following conditions are met:

(A) The estimate of R for the first month is based on information on the composition of the feedstock;

(B) The party calculates R in the second month based on the application of a radiocarbon dating test on a composite sample pursuant to (f)(9)(iii)(B) of this section; and

(C) The party adjusts the value of R used to generate RINs in the second month using the following formula

$$R_{i+1,adj} = 2 \times R_{i+1,calc} - R_{i,est}$$

Where

$R_{i+1,adj}$ = Adjusted value of R for use in generating RINs in month the second month $i + 1$.

$R_{i+1,calc}$ = Calculated value of R in second month $i + 1$ by applying a radiocarbon dating test method to a composite sample of fuel.

$R_{i,est}$ = Estimate of R for the first month i .

(10)(i) For purposes of this section, electricity that is only distributed via a closed, private, non-commercial system is considered renewable fuel and

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RINs may be generated if all of the following apply:

(A) The electricity is produced from renewable biomass and qualifies for a D code in Table 1 to this section or has received approval for use of a D code by the Administrator.

(B) The RIN generator has documentation for the sale, if applicable, and use of a specific quantity of renewable electricity as transportation fuel, or has obtained affidavits from all parties selling or using the electricity as transportation fuel.

(C) The electricity is used as a transportation fuel and for no other purposes.

(ii) For purposes of this section, CNG or LNG produced from biogas that is only distributed via a closed, private, non-commercial system is considered renewable fuel for which RINs may be generated if all of the following apply:

(A) The CNG/LNG is produced from renewable biomass and qualifies for a D code in Table 1 to this section or has received approval for use of a D code by the Administrator.

(B) The RIN generator has entered into a written contract for the sale or use of a specific quantity of CNG/LNG to be used as transportation fuel, or obtained affidavits from all parties selling or using the CNG/LNG as transportation fuel.

(C) The CNG/LNG is used as a transportation fuel and for no other purposes.

(iii) A producer of electricity that is generated by co-firing a combination of renewable biomass and fossil fuel may generate RINs only for the portion attributable to the renewable biomass, using the procedure described in paragraph (f)(4) of this section.

(11)(i) For purposes of this section, electricity that is introduced into a commercial distribution system (transmission grid) is considered renewable fuel for which RINs may be generated if all of the following apply:

(A) The electricity is produced from renewable biomass and qualifies for a D code in Table 1 of this section or has received approval for use of a D code by the Administrator.

(B) The RIN generator has documentation for the sale and use of a specific quantity of renewable electricity

as transportation fuel, or has obtained affidavits from all parties selling or using the electricity as transportation fuel.

(C) The quantity of electricity for which RINs were generated was sold for use as transportation fuel and for no other purpose.

(D) The renewable electricity was loaded onto and withdrawn from a physically connected transmission grid.

(E) The amount of electricity sold for use as transportation fuel corresponds to the amount of electricity derived from biogas that was placed into the commercial distribution system.

(F) No other party relied upon the renewable electricity for the creation of RINs.

(ii) For purposes of this section, CNG or LNG produced from biogas that is introduced into a commercial distribution system is considered renewable fuel for which RINs may be generated if all the following apply:

(A) The fuel is produced from renewable biomass and qualifies for a D code in Table 1 to this section or has received approval for use of a D code by the Administrator.

(B) The RIN generator has entered into a written contract for the sale or use of a specific quantity of renewable CNG/LNG, taken from a commercial distribution system (e.g., physically connected pipeline, barge, truck, rail), for use as a transportation fuel, or has obtained affidavits from all parties selling or using the CNG/LNG taken from a commercial distribution system as a transportation fuel.

(C) The quantity of CNG/LNG for which RINs were generated was sold for use as transportation fuel and for no other purposes.

(D) The biogas/CNG/LNG was injected into and withdrawn from the same commercial distribution system.

(E) The biogas/CNG/LNG that is ultimately withdrawn from the commercial distribution system for use as transportation fuel is withdrawn in a manner and at a time consistent with the transport of the biogas/CNG/LNG between the injection and withdrawal points.

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(F) The volume and heat content of biogas/CNG/LNG injected into a pipeline and the volume of biogas/CNG/LNG withdrawn to make a transportation fuel are measured by continuous metering.

(G) The amount of fuel sold for use as transportation fuel corresponds to the amount of fuel derived from biogas that was placed into the commercial distribution system.

(H) No other party relied upon the volume of biogas/CNG/LNG for the creation of RINs.

(iii) For renewable electricity that is generated by co-firing a combination of renewable biomass and fossil fuel, the producer may generate RINs only for the portion attributable to the renewable biomass, using the procedure described in paragraph (f)(4) of this section.

(12) For purposes of Table 1 of this section, process heat produced from combustion of gas at a renewable fuel facility is considered derived from biomass if the gas is biogas.

(i) For biogas directly transported to the facility without being placed in a commercial distribution system, all of the following conditions must be met:

(A) The producer has entered into a written contract for the procurement of a specific volume of biogas with a specific heat content.

(B) The volume of biogas was sold to the renewable fuel production facility, and to no other facility.

(C) The volume and heat content of biogas injected into the pipeline and the volume of gas used as process heat are measured by continuous metering.

(ii) For biogas that has been gathered, processed and injected into a common carrier pipeline, all of the following conditions must be met:

(A) The producer has entered into a written contract for the procurement of a specific volume of biogas with a specific heat content.

(B) The volume of biogas was sold to the renewable fuel production facility, and to no other facility.

(C) The volume of biogas that is withdrawn from the pipeline is withdrawn in a manner and at a time consistent with the transport of fuel between the injection and withdrawal points.

(D) The volume and heat content of biogas injected into the pipeline and the volume of gas used as process heat are measured by continuous metering.

(E) The common carrier pipeline into which the biogas is placed ultimately serves the producer's renewable fuel facility.

(iii) The process heat produced from combustion of gas at a renewable fuel facility described in paragraph (f)(12)(i) of this section shall not be considered derived from biomass if any other party relied upon the contracted volume of biogas for the creation of RINs.

(13) In order for facilities to satisfy the requirements of the advanced biofuel grain sorghum pathway all of the following conditions (in addition to other applicable requirements) apply.

(i) The quantity of electricity used at the site that is purchased from the grid must be measured and recorded by continuous metering.

(ii) All electricity used on-site that is not purchased from the grid must be produced on-site from biogas from landfills, waste treatment plants, and/or waste digesters.

(iii) For biogas directly transported to the facility without being placed in a commercial distribution system, all of the following conditions must be met:

(A) The producer has entered into a written contract for the procurement of biogas that specifies the volume of biogas, its heat content, and that the biogas must be derived from a landfill, waste treatment plant and/or waste digester.

(B) The volume of biogas was sold to the renewable fuel production facility, and to no other facility.

(C) The volume and heat content of biogas injected into the pipeline and the volume of gas used at the renewable fuel production facility are measured by continuous metering.

(iv) [Reserved]

(v) For biogas that has been gathered, processed and injected into a common carrier pipeline, all of the following conditions must be met:

(A) The producer has entered into a written contract for the procurement

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of biogas that specifies a specific volume of biogas, with a specific heat content, and that the biogas must be derived from a landfill, waste treatment plant and/or waste digester.

(B) The volume of biogas was sold to the renewable fuel production facility, and to no other facility.

(C) The volume of biogas that is withdrawn from the pipeline is withdrawn in a manner and at a time consistent with the transport of fuel between the injection and withdrawal points.

(D) The volume and heat content of biogas injected into the pipeline and the volume of gas used at the renewable fuel production facility are measured by continuous metering.

(E) The common carrier pipeline into which the biogas is placed ultimately serves the producer's renewable fuel facility.

(vi) No party relied upon the contracted volume of biogas for the creation of RINs.

(14) A producer or importer of renewable fuel using giant reed (*Arundo donax*) or napier grass (*Pennisetum purpureum*) as a feedstock may generate RINs for that renewable fuel if:

(i) The feedstock is produced, managed, transported, collected, monitored, and processed according to a Risk Mitigation Plan approved by EPA under the registration procedures specified in § 80.1450(b)(1)(x)(A); or,

(ii) EPA has determined that there is not a significant likelihood of spread beyond the planting area of the feedstock used for production of the renewable fuel. Any determination that *Arundo donax* or *Pennisetum purpureum* does not present a significant likelihood of spread beyond the planting area must be based upon clear and compelling evidence, including information and supporting data submitted by the producer. Such a determination must be made by EPA as specified in § 80.1450(b)(1)(x)(B).

(15) *Application of formulas in paragraph (f)(3)(vi) of this section to certain producers generating D3 or D7 RINs.*

(i) If a producer seeking to generate D code 3 or D code 7 RINs produces a single type of renewable fuel using two or more feedstocks converted simultaneously, and at least one of the feed-

stocks does not have a minimum 75% average adjusted cellulosic content, one of the following additional requirements apply:

(A) If the producer is using a thermochemical process to convert cellulosic biomass into cellulosic biofuel, the producer is subject to additional registration requirements under § 80.1450(b)(1)(xiii)(A).

(B) If the producer is using any process other than a thermochemical process, or is using a combination of processes, the producer is subject to additional registration requirements under § 80.1450(b)(1)(xiii)(B) and reporting requirements under § 80.1451(b)(1)(ii)(U).

(ii) [Reserved]

(16) *Renewable fuel produced from crop residue.* Producers generating RINs for qualifying renewable fuel utilizing crop residue as feedstock under Pathway K or Pathway L must meet all of the following conditions (in addition to any other applicable requirements):

(i) Registration requirements under § 80.1450(b)(1)(xv).

(ii) Reporting requirements under § 80.1451(b)(1)(ii)(V).

(iii) Recordkeeping requirements under § 80.1454(s).

(17)(i) For purposes of this section, any renewable fuel other than ethanol, biodiesel, or renewable diesel that meets the ASTM D 975-13a Grade No. 1-D or No. 2-D specifications (incorporated by reference, see § 80.1468) is considered renewable fuel and the producer or importer may generate RINs for such fuel only if all of the following apply:

(A) The fuel is produced from renewable biomass and qualifies for a D code in Table 1 to this section or has been otherwise approved by the Administrator.

(B) The fuel producer or importer maintains records demonstrating that the fuel was produced for use as a transportation fuel, heating oil or jet fuel by any of the following:

(1) Blending the renewable fuel into gasoline or diesel fuel to produce a transportation fuel, heating oil or jet fuel that meets all applicable standards.

(2) Entering into a written contract for the sale of the renewable fuel, which specifies the purchasing party

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shall blend the fuel into gasoline or diesel fuel to produce a transportation fuel, heating oil or jet fuel that meets all applicable standards.

(3) Entering into a written contract for the sale of the renewable fuel, which specifies that the fuel shall be used in its neat form as a transportation fuel, heating oil or jet fuel that meets all applicable standards.

(C) The fuel was sold for use in or as a transportation fuel, heating oil, or jet fuel, and for no other purpose.

(ii) [Reserved]

(g) *Delayed RIN generation*—(1) Parties who produce or import renewable fuel may elect to generate delayed RINs to represent renewable fuel volumes that have already been transferred to another party if those renewable fuel volumes meet all of the following requirements.

(i) The renewable fuel volumes can be described by a new pathway that has been added to Table 1 to § 80.1426, or approved by petition pursuant to § 80.1416, after July 1, 2010.

(A) For new pathways that EPA approves in response to petitions submitted pursuant to § 80.1416, complete petitions must be received by EPA by January 31, 2011.

(B) [Reserved]

(ii) The renewable fuel volumes can be described by a pathway that:

(A) Is biodiesel that is made from canola oil through transesterification using natural gas or biomass for process energy; or

(B) EPA has determined was in use as of July 1, 2010, for the primary purpose of producing transportation fuel, heating oil, or jet fuel for commercial sale.

(iii) The renewable fuel volumes were not designated or intended for export from the 48 contiguous states plus Hawaii by the renewable fuel producer or importer, and the producer or importer of the renewable fuel volumes does not know or have reason to know that the volumes were exported from the 48 contiguous states plus Hawaii.

(2) When a new pathway is added to Table 1 to § 80.1426 or approved by petition pursuant to § 80.1416, EPA will specify in its approval action the effective date on which the new pathway becomes valid for the generation of RINs and whether the fuel in question meets

the requirements of paragraph (g)(1)(ii) of this section.

(i) The effective date for the pathway describing biodiesel that is made from canola oil through transesterification using natural gas or biomass for process energy is September 28, 2010.

(ii) [Reserved]

(3) Delayed RINs can only be generated to represent renewable fuel volumes produced in the 48 contiguous states plus Hawaii or imported into the 48 contiguous states plus Hawaii between July 1, 2010, and the earlier of either of the following dates:

(i) The effective date (identified pursuant to paragraph (g)(2) of this section) of the new pathway through which the fuel in question was produced; or

(ii) December 31, 2011.

(4) Delayed RINs must be generated no later than 60 days after the effective date (identified pursuant to paragraph (g)(2) of this section) of the pathway by which the fuel in question was produced.

(5) A party authorized pursuant to paragraph (g)(1) of this section to generate delayed RINs, and electing to do so, who generated RINs pursuant to 80.1426(f)(6) for fuel produced through a pathway described in paragraph (g)(1) of this section, and transferred those RINs with renewable fuel volumes between July 1, 2010 and the effective date (identified pursuant to paragraph (g)(2) of this section) of that pathway, must retire a number of gallon-RINs prior to generating delayed RINs.

(i) The number of gallon-RINs retired by a party pursuant to this paragraph must not exceed the number of gallon-RINs originally generated by the party to represent fuel described in paragraph (g)(1) of this section that was produced in the 48 contiguous states plus Hawaii or imported into the 48 contiguous states plus Hawaii, and transferred to another party, between July 1, 2010 and the earlier of either of the following dates:

(A) The effective date (identified pursuant to paragraph (g)(2) of this section) of the new pathway through which the fuel in question was produced; or

(B) December 31, 2011.

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(ii) Retired RINs must have a D code of 6.

(iii) Retired RINs must have a K code of 2.

(iv) Retired RINs must have been generated in the same year as the gallon-RINs originally generated by the party to represent fuel described in paragraph (g)(1) of this section.

(A) For gallon-RINs originally generated in 2010 to represent fuel described in paragraph (g)(1) of this section, the generation year of retired RINs shall be 2010.

(B) For gallon-RINs originally generated in 2011 to represent fuel described in paragraph (g)(1) of this section, the generation year of retired RINs shall be 2011.

(6) For parties that retire RINs pursuant to paragraph (g)(5) of this section, the number of delayed gallon-RINs generated shall be equal to the number of gallon-RINs retired in accordance with paragraph (g)(5) of this section.

(7) A party authorized pursuant to paragraph (g)(1) of this section to generate delayed RINs, and electing to do so, who did not generate RINs pursuant to § 80.1426(f)(6) for renewable fuel produced in the 48 contiguous states plus Hawaii or imported into the 48 contiguous states plus Hawaii between July 1, 2010 and the effective date (identified pursuant to paragraph (g)(2) of this section) of a new pathway for the fuel in question, may generate a number of delayed gallon-RINs for that renewable fuel in accordance with paragraph (f) of this section.

(i) The standardized volume of fuel (V_s) used by a party to determine the RIN volume (V_{RIN}) under paragraph (f) of this section shall be the standardized volume of the fuel described in paragraph (g)(1)(i) of this section that was produced in the 48 contiguous states plus Hawaii or imported into the 48 contiguous states plus Hawaii by the party, and transferred to another party, between July 1, 2010 and the earlier of either of the following dates:

(A) The effective date (identified pursuant to paragraph (g)(2) of this section) of the new pathway through which the fuel in question was produced; or

(B) December 31, 2011.

(ii) [Reserved]

(8) The renewable fuel for which delayed RINs are generated must be described by a pathway that satisfies the requirements of paragraph (g)(1) of this section.

(9) All delayed RINs generated by a renewable fuel producer or importer must be generated within EMTS on the same date.

(10) The generation year of delayed RINs as designated in EMTS shall be the year that the renewable fuel volumes they represent were either produced or imported into the 48 contiguous states plus Hawaii.

(i) For renewable fuel volumes produced or imported in 2010, the generation year of delayed RINs shall be 2010 and the production date specified in EMTS shall be 07/01/2010.

(ii) For renewable fuel volumes produced or imported in 2011, the generation year of delayed RINs shall be 2011 and the production date specified in EMTS shall be 01/01/2011.

(11) Delayed RINs shall be generated as assigned RINs in EMTS with a batch number that begins with "DRN", and then immediately separated by the RIN generator.

(12) The D code that shall be used in delayed RINs shall be the D code which corresponds to the new pathway.

(13) Except as provided in this paragraph (g), all other provisions in this Subpart M that pertain to the identification of fuels for which RINs may be generated, the generation and use of RINs, and recordkeeping and reporting, are also applicable to delayed RINs.

[75 FR 14863, Mar. 26, 2010, as amended at 75 FR 26038, May 10, 2010; 75 FR 37733, June 30, 2010; 75 FR 59632, Sept. 28, 2010; 75 FR 76828, Dec. 9, 2010; 75 FR 79977, Dec. 21, 2010; 77 FR 1355, Jan. 9, 2012; 77 FR 61294, Oct. 9, 2012; 77 FR 74605, Dec. 17, 2012; 78 FR 14216, Mar. 5, 2013; 78 FR 41714, July 11, 2013; 78 FR 62470, Oct. 22, 2013; 79 FR 42160, July 18, 2014; 79 FR 42113, July 18, 2014; 80 FR 9098, Feb. 19, 2015; 80 FR 18141, Apr. 3, 2015; 80 FR 77517, Dec. 14, 2015]

§ 80.1427 How are RINs used to demonstrate compliance?

(a) *Obligated party renewable volume obligations.* (1) Except as specified in paragraph (b) of this section or § 80.1456, each party that is an obligated party under § 80.1406 and is obligated to

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meet the Renewable Volume Obligations under § 80.1407 must demonstrate pursuant to § 80.1451(a)(1) that it has retired for compliance purposes a sufficient number of RINs to satisfy the following equations:

(i) *Cellulosic biofuel.*

$$(\Sigma \text{RINNUM})_{\text{CB},i} + (\Sigma \text{RINNUM})_{\text{CB},i-1} = \text{RVO}_{\text{CB},i}$$

Where:

$(\Sigma \text{RINNUM})_{\text{CB},i}$ = Sum of all owned gallon-RINs that are valid for use in complying with the cellulosic biofuel RVO, were generated in year i , and are being applied towards the $\text{RVO}_{\text{CB},i}$, in gallons.

$(\Sigma \text{RINNUM})_{\text{CB},i-1}$ = Sum of all owned gallon-RINs that are valid for use in complying with the cellulosic biofuel RVO, were generated in year $i-1$, and are being applied towards the $\text{RVO}_{\text{CB},i}$, in gallons.

$\text{RVO}_{\text{CB},i}$ = The Renewable Volume Obligation for cellulosic biofuel for the obligated party for calendar year i , in gallons, pursuant to § 80.1407.

(ii) *Biomass-based diesel.* Except as provided in paragraph (a)(7) of this section,

$$(\Sigma \text{RINNUM})_{\text{BBD},i} + (\Sigma \text{RINNUM})_{\text{BBD},i-1} = \text{RVO}_{\text{BBD},i}$$

Where:

$(\Sigma \text{RINNUM})_{\text{BBD},i}$ = Sum of all owned gallon-RINs that are valid for use in complying with the biomass-based diesel RVO, were generated in year i , and are being applied towards the $\text{RVO}_{\text{BBD},i}$, in gallons.

$(\Sigma \text{RINNUM})_{\text{BBD},i-1}$ = Sum of all owned gallon-RINs that are valid for use in complying with the biomass-based diesel RVO, were generated in year $i-1$, and are being applied towards the $\text{RVO}_{\text{BBD},i}$, in gallons.

$\text{RVO}_{\text{BBD},i}$ = The Renewable Volume Obligation for biomass-based diesel for the obligated party for calendar year i after 2010, in gallons, pursuant to § 80.1407.

(iii) *Advanced biofuel.*

$$(\Sigma \text{RINNUM})_{\text{AB},i} + (\Sigma \text{RINNUM})_{\text{AB},i-1} = \text{RVO}_{\text{AB},i}$$

Where:

$(\Sigma \text{RINNUM})_{\text{AB},i}$ = Sum of all owned gallon-RINs that are valid for use in complying with the advanced biofuel RVO, were generated in year i , and are being applied towards the $\text{RVO}_{\text{AB},i}$, in gallons.

$(\Sigma \text{RINNUM})_{\text{AB},i-1}$ = Sum of all owned gallon-RINs that are valid for use in complying with the advanced biofuel RVO, were generated in year $i-1$, and are being applied towards the $\text{RVO}_{\text{AB},i}$, in gallons.

$\text{RVO}_{\text{AB},i}$ = The Renewable Volume Obligation for advanced biofuel for the obligated

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party for calendar year i , in gallons, pursuant to § 80.1407.

(iv) *Renewable fuel.*

$$(\Sigma \text{RINNUM})_{\text{RF},i} + (\Sigma \text{RINNUM})_{\text{RF},i-1} = \text{RVO}_{\text{RF},i}$$

Where:

$(\Sigma \text{RINNUM})_{\text{RF},i}$ = Sum of all owned gallon-RINs that are valid for use in complying with the renewable fuel RVO, were generated in year i , and are being applied towards the $\text{RVO}_{\text{RF},i}$, in gallons.

$(\Sigma \text{RINNUM})_{\text{RF},i-1}$ = Sum of all owned gallon-RINs that are valid for use in complying with the renewable fuel RVO, were generated in year $i-1$, and are being applied towards the $\text{RVO}_{\text{RF},i}$, in gallons.

$\text{RVO}_{\text{RF},i}$ = The Renewable Volume Obligation for renewable fuel for the obligated party for calendar year i , in gallons, pursuant to § 80.1407.

(2) Except as described in paragraph (a)(4) of this section, RINs that are valid for use in complying with each Renewable Volume Obligation are determined by their D codes.

(i) RINs with a D code of 3 or 7 are valid for compliance with the cellulosic biofuel RVO.

(ii) RINs with a D code of 4 or 7 are valid for compliance with the biomass-based diesel RVO.

(iii) RINs with a D code of 3, 4, 5, or 7 are valid for compliance with the advanced biofuel RVO.

(iv) RINs with a D code of 3, 4, 5, 6, or 7 are valid for compliance with the renewable fuel RVO.

(3)(i) Except as provided in paragraph (a)(3)(ii) of this section, a party may use the same RIN to demonstrate compliance with more than one RVO so long as it is valid for compliance with all RVOs to which it is applied.

(ii) A cellulosic diesel RIN with a D code of 7 cannot be used to demonstrate compliance with both a cellulosic biofuel RVO and a biomass-based diesel RVO.

(4) Notwithstanding the requirements of § 80.1428(c) or paragraph (a)(6)(i) of this section, for purposes of demonstrating compliance for calendar years 2010 or 2011, RINs generated pursuant to § 80.1126 that have not been used for compliance purposes may be used for compliance in 2010 or 2011, as follows, insofar as permissible pursuant to paragraphs (a)(5) and (a)(7)(iii) of this section:

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(i) A RIN generated pursuant to § 80.1126 with a D code of 2 and an RR code of 15, 16, or 17 is deemed equivalent to a RIN generated pursuant to § 80.1426 having a D code of 4.

(ii) A RIN generated pursuant to § 80.1126 with a D code of 1 is deemed equivalent to a RIN generated pursuant to § 80.1426 having a D code of 3.

(iii) All other RINs generated pursuant to § 80.1126 are deemed equivalent to RINs generated pursuant to § 80.1426 having D codes of 6.

(iv) A RIN generated pursuant to § 80.1126 that was retired pursuant to § 80.1129(e) because the associated volume of fuel was not used as motor vehicle fuel may be reinstated for use in complying with a 2010 RVO pursuant to § 80.1429(g).

(5) The value of $(\Sigma \text{RINNUM})_{i-1}$ may not exceed values determined by the following inequalities except as provided in paragraph (a)(7)(iii) of this section and § 80.1442(d)

$$\begin{aligned} (\Sigma \text{RINNUM})_{\text{CB},i-1} &\leq 0.20 * \text{RVO}_{\text{CB},i} \\ (\Sigma \text{RINNUM})_{\text{BBD},i-1} &\leq 0.20 * \text{RVO}_{\text{BBD},i} \\ (\Sigma \text{RINNUM})_{\text{AB},i-1} &\leq 0.20 * \text{RVO}_{\text{AB},i} \\ (\Sigma \text{RINNUM})_{\text{RF},i-1} &\leq 0.20 * \text{RVO}_{\text{RF},i} \end{aligned}$$

(6) Except as provided in paragraph (a)(7) of this section:

(i) RINs may only be used to demonstrate compliance with the RVOs for the calendar year in which they were generated or the following calendar year.

(ii) RINs used to demonstrate compliance in one year cannot be used to demonstrate compliance in any other year.

(7) *Biomass-based diesel in 2010.*

(i) Prior to determining compliance with the 2010 biomass-based diesel RVO, obligated parties may reduce the value of $\text{RVO}_{\text{BBD},2010}$ by an amount equal to the sum of all 2008 and 2009 RINs that they used for compliance purposes for calendar year 2009 which have a D code of 2 and an RR code of 15, 16, or 17.

(ii) For calendar year 2010 only, the following equation shall be used to determine compliance with the biomass-based diesel RVO instead of the equation in paragraph (a)(1)(ii) of this section

$$(\Sigma \text{RINNUM})_{\text{BBD},2010} + (\Sigma \text{RINNUM})_{\text{BBD},2009} + (\Sigma \text{RINNUM})_{\text{BBD},2008} = \text{RVO}_{\text{BBD},2010}$$

Where

$(\Sigma \text{RINNUM})_{\text{BBD},2010}$ = Sum of all owned gallon-RINs that are valid for use in complying with the biomass-based diesel RVO, were generated in year 2010, and are being applied towards the $\text{RVO}_{\text{BBD},2010}$, in gallons.

$(\Sigma \text{RINNUM})_{\text{BBD},2009}$ = Sum of all owned gallon-RINs that are valid for use in complying with the biomass-based diesel RVO, were generated in year 2009, have not previously been used for compliance purposes, and are being applied towards the $\text{RVO}_{\text{BBD},2010}$, in gallons.

$(\Sigma \text{RINNUM})_{\text{BBD},2008}$ = Sum of all owned gallon-RINs that are valid for use in complying with the biomass-based diesel RVO, were generated in year 2008, have not previously been used for compliance purposes, and are being applied towards the $\text{RVO}_{\text{BBD},2010}$, in gallons.

$\text{RVO}_{\text{BBD},2010}$ = The Renewable Volume Obligation for biomass-based diesel for the obligated party for calendar year 2010, in gallons, pursuant to § 80.1407 or § 80.1430, as adjusted by paragraph (a)(7)(i) of this section.

(iii) The values of $(\Sigma \text{RINNUM})_{2008}$ and $(\Sigma \text{RINNUM})_{2009}$ may not exceed values determined by both of the following inequalities

$$\begin{aligned} (\Sigma \text{RINNUM})_{\text{BBD},2008} &\leq 0.087 * \text{RVO}_{\text{BBD},2010} \\ (\Sigma \text{RINNUM})_{\text{BBD},2008} + (\Sigma \text{RINNUM})_{\text{BBD},2009} &\leq 0.20 * \text{RVO}_{\text{BBD},2010} \end{aligned}$$

(8) A party may only use a RIN for purposes of meeting the requirements of paragraph (a)(1) or (a)(7) of this section if that RIN is a separated RIN with a K code of 2 obtained in accordance with §§ 80.1428 and 80.1429.

(9) The number of gallon-RINs associated with a given batch-RIN that can be used for compliance with the RVOs shall be calculated from the following formula:

$$\text{RINNUM} = \frac{\text{EEEEEEEEEE} - \text{SSSSSSSS}}{1}$$

Where:

RINNUM = Number of gallon-RINs associated with a batch-RIN, where each gallon-RIN represents one gallon of renewable fuel for compliance purposes.

EEEEEEEEEE = Batch-RIN component identifying the last gallon-RIN associated with the batch-RIN.

SSSSSSSS = Batch-RIN component identifying the first gallon-RIN associated with the batch-RIN.

(b) *Deficit carryovers.* (1) An obligated party that fails to meet the requirements of paragraph (a)(1) or (a)(7) of

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this section for calendar year i is permitted to carry a deficit into year $i + 1$ under the following conditions:

(i) The party did not carry a deficit into calendar year i from calendar year $i-1$ for the same RVO.

(ii) The party subsequently meets the requirements of paragraph (a)(1) of this section for calendar year $i + 1$ and carries no deficit into year $i + 2$ for the same RVO.

(iii) For compliance with the biomass-based diesel RVO in calendar year 2011, the deficit which is carried over from 2010 is no larger than 57% of the party's 2010 biomass-based diesel RVO as determined prior to any adjustment applied pursuant to paragraph (a)(7)(i) of this section.

(iv) The party uses the same compliance approach in year $i + 1$ as it did in year i , as provided in § 80.1406(c)(2).

(2) A deficit is calculated according to the following formula:

$$D_i = \text{RVO}_i - [(\Sigma \text{RINNUM})_i + (\Sigma \text{RINNUM})_{i-1}]$$

Where:

D_i = The deficit, in gallons, generated in calendar year i that must be carried over to year $i + 1$ if allowed pursuant to paragraph (b)(1) of this section.

RVO_i = The Renewable Volume Obligation for the obligated party or renewable fuel exporter for calendar year i , in gallons.

$(\Sigma \text{RINNUM})_i$ = Sum of all acquired gallon-RINs that were generated in year i and are being applied towards the RVO_i , in gallons.

$(\Sigma \text{RINNUM})_{i-1}$ = Sum of all acquired gallon-RINs that were generated in year $i-1$ and are being applied towards the RVO_i , in gallons.

(c) *Exporter Renewable Volume Obligations (ERVOS).* (1) Each exporter of renewable fuel that is obligated to meet Exporter Renewable Volume Obligations under § 80.1430 must demonstrate pursuant to § 80.1451(a)(1) that it has retired for compliance purposes a sufficient number of RINs to meet its ERVOS by the deadline specified in § 80.1430(f).

(2) In fulfillment of its ERVOS, each exporter is subject to the provisions of paragraphs (a)(2), (a)(3), (a)(6), and (a)(8) of this section.

(3) No more than 20 percent of the ERVO calculated according to a formula at § 80.1430(b) may be fulfilled using RINs generated in the year prior

to the year in which the RVO was incurred.

[75 FR 14863, Mar. 26, 2010, as amended at 75 FR 26042, May 10, 2010; 79 FR 42114, July 18, 2014]

§ 80.1428 General requirements for RIN distribution.

(a) *RINs assigned to volumes of renewable fuel*— (1) *Assigned RIN*, for the purposes of this subpart, means a RIN assigned to a volume of renewable fuel pursuant to § 80.1426(e) with a K code of 1.

(2) Except as provided in § 80.1429, no person can separate a RIN that has been assigned to a batch pursuant to § 80.1426(e).

(3) An assigned RIN cannot be transferred to another person without simultaneously transferring a volume of renewable fuel to that same person.

(4) No more than 2.5 assigned gallon-RINs with a K code of 1 can be transferred to another person with every gallon of renewable fuel transferred to that same person.

(5)(i) On each of the dates listed in paragraph (a)(5)(ii) of this section in any calendar year, the following equation must be satisfied for assigned RINs and volumes of renewable fuel owned by a person:

$$\Sigma(\text{RIN})_D \leq \Sigma(V_{si} * 2.5)_D$$

Where:

D = Applicable date.

$\Sigma(\text{RIN})_D$ = Sum of all assigned gallon-RINs with a K code of 1 that are owned on date D .

$(V_{si})_D$ = Volume i of renewable fuel owned on date D , standardized to 60 °F, in gallons.

(ii) The applicable dates are March 31, June 30, September 30, and December 31.

(6) Any transfer of ownership of assigned RINs must be documented on product transfer documents generated pursuant to § 80.1453.

(i) The RIN must be recorded on the product transfer document used to transfer ownership of the volume of renewable fuel to another person; or

(ii) The RIN must be recorded on a separate product transfer document transferred to the same person on the same day as the product transfer document used to transfer ownership of the volume of renewable fuel.

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(b) *RINs separated from volumes of renewable fuel*—(1) *Separated RIN*, for the purposes of this subpart, means a RIN with a K code of 2 that has been separated from a volume of renewable fuel pursuant to § 80.1429.

(2) Any person that has registered pursuant to § 80.1450 can own a separated RIN.

(3) Separated RINs can be transferred any number of times.

(c) *RIN expiration*. Except as provided in § 80.1427(a)(7), a RIN is valid for compliance during the calendar year in which it was generated, or the following calendar year. Any RIN that is not used for compliance purposes for the calendar year in which it was generated, or for the following calendar year, will be considered an expired RIN. Pursuant to § 80.1431(a), an expired RIN will be considered an invalid RIN and cannot be used for compliance purposes.

(d) Any batch-RIN can be divided into multiple batch-RINs, each representing a smaller number of gallon-RINs, if all of the following conditions are met:

(1) All RIN components other than SSSSSSSS and EEEEEEEE are identical for the original parent and newly formed daughter RINs.

(2) The sum of the gallon-RINs associated with the multiple daughter batch-RINs is equal to the gallon-RINs associated with the parent batch-RIN.

[75 FR 14863, Mar. 26, 2010, as amended at 75 FR 26042, May 10, 2010]

§ 80.1429 Requirements for separating RINs from volumes of renewable fuel.

(a)(1) Separation of a RIN from a volume of renewable fuel means termination of the assignment of the RIN to a volume of renewable fuel.

(2) RINs that have been separated from volumes of renewable fuel become separated RINs subject to the provisions of § 80.1428(b).

(b) A RIN that is assigned to a volume of renewable fuel can be separated from that volume only under one of the following conditions:

(1) Except as provided in paragraphs (b)(7) and (b)(9) of this section, a party that is an obligated party according to § 80.1406 must separate any RINs that

have been assigned to a volume of renewable fuel if that party owns that volume.

(2) Except as provided in paragraph (b)(6) of this section, any party that owns a volume of renewable fuel must separate any RINs that have been assigned to that volume once the volume is blended with gasoline or fossil-based diesel to produce a transportation fuel, heating oil, or jet fuel. A party may separate up to 2.5 RINs per gallon of blended renewable fuel.

(3) Any party that exports a volume of renewable fuel must separate any RINs that have been assigned to the exported volume. A party may separate up to 2.5 RINs per gallon of exported renewable fuel.

(4) Any party that produces, imports, owns, sells, or uses a volume of neat renewable fuel, or a blend of renewable fuel and diesel fuel, must separate any RINs that have been assigned to that volume of neat renewable fuel or that blend if:

(i) The party designates the neat renewable fuel or blend as transportation fuel, heating oil, or jet fuel; and

(ii) The neat renewable fuel or blend is used without further blending, in the designated form, as transportation fuel, heating oil, or jet fuel.

(5) Any party that produces, imports, owns, sells, or uses a volume of electricity or biogas for which RINs have been generated in accordance with § 80.1426(f) must separate any RINs that have been assigned to that volume of renewable electricity or biogas if:

(i) The party designates the electricity or biogas as transportation fuel; and

(ii) The electricity or biogas is used as transportation fuel.

(6) RINs assigned to a volume of biodiesel (mono-alkyl ester) can only be separated from that volume pursuant to paragraph (b)(2) of this section if such biodiesel is blended into diesel fuel at a concentration of 80 volume percent biodiesel (mono-alkyl ester) or less.

(i) This paragraph (b)(6) shall not apply to biodiesel owned by obligated parties or to exported volumes of biodiesel.

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(ii) This paragraph (b)(6) shall not apply to parties meeting the requirements of paragraph (b)(4) of this section.

(7) For RINs that an obligated party generates for renewable fuel that has not been blended into gasoline or diesel to produce a transportation fuel, heating oil, or jet fuel, the obligated party can only separate such RINs from volumes of renewable fuel if the number of gallon-RINs separated in a calendar year are less than or equal to a limit set as follows:

(i) For RINs with a D code of 3, the limit shall be equal to RVO_{CB} .

(ii) For RINs with a D code of 4, the limit shall be equal to RVO_{BBD} .

(iii) For RINs with a D code of 7, the limit shall be equal to the larger of RVO_{BBD} or RVO_{CB} .

(iv) For RINs with a D code of 5, the limit shall be equal to $RVO_{AB} - RVO_{CB} - RVO_{BBD}$.

(v) For RINs with a D code of 6, the limit shall be equal to $RVO_{RF} - RVO_{AB}$.

(8) Small refiners and small refineries may only separate RINs that have been assigned to volumes of renewable fuel that the party blends into gasoline or diesel to produce transportation fuel, heating oil, or jet fuel, or that the party used as transportation fuel, heating oil, or jet fuel. This paragraph (b)(8) shall apply only under the following conditions:

(i) During the calendar year in which the party has received a small refinery exemption under § 80.1441 or a small refiner exemption under § 80.1442; and

(ii) The party is not otherwise an obligated party during the period of time that the small refinery or small refiner exemption is in effect.

(9) Except as provided in paragraphs (b)(2) through (b)(5) and (b)(8) of this section, parties whose non-export renewable volume obligations are solely related to either the importation of products listed in § 80.1407(c) or § 80.1407(e) or to the addition of blendstocks into a volume of finished gasoline, finished diesel fuel, RBOB, or CBOB, can only separate RINs from volumes of renewable fuel if the number of gallon-RINs separated in a calendar year is less than or equal to a limit set as follows:

(i) For RINs with a D code of 3, the limit shall be equal to RVO_{CB} .

(ii) For RINs with a D code of 4, the limit shall be equal to RVO_{BBD} .

(iii) For RINs with a D code of 7, the limit shall be equal to the larger of RVO_{BBD} or RVO_{CB} .

(iv) For RINs with a D code of 5, the limit shall be equal to $RVO_{AB} - RVO_{CB} - RVO_{BBD}$.

(v) For RINs with a D code of 6, the limit shall be equal to $RVO_{RF} - RVO_{AB}$.

(10) Any party that produces a volume of renewable fuel may separate any RINs that have been generated to represent that volume of renewable fuel or that blend if that party retires the separated RINs to replace invalid RINs according to § 80.1474.

(c) The party responsible for separating a RIN from a volume of renewable fuel shall change the K code in the RIN from a value of 1 to a value of 2 prior to transferring the RIN to any other party.

(d) Upon and after separation of a RIN from its associated volume of renewable fuel, the separated RIN must be accompanied by a PTD pursuant to § 80.1453 when transferred to another party.

(e) Upon and after separation of a RIN from its associated volume of renewable fuel, product transfer documents used to transfer ownership of the volume must meet the requirements of § 80.1453.

(f) [Reserved]

(g) Any 2009 or 2010 RINs retired pursuant to § 80.1129 because renewable fuel was used in a nonroad vehicle or nonroad engine (except for ocean-going vessels), or as heating oil or jet fuel may be reinstated by the retiring party for sale or use to demonstrate compliance with a 2010 RVO.

[75 FR 14863, Mar. 26, 2010, as amended at 75 FR 26042, May 10, 2010; 77 FR 1355, Jan. 9, 2012; 79 FR 42115, July 18, 2014]

§ 80.1430 Requirements for exporters of renewable fuels.

(a) Any exporter of renewable fuel, whether in its neat form or blended shall acquire sufficient RINs to comply with all applicable Renewable Volume Obligations under paragraphs (b) through (e) of this section representing

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(f) Each exporter of renewable fuel must fulfill its ERVO for each discrete volume of exported renewable fuel within thirty days of export, and must demonstrate compliance with its ERVOs pursuant to § 80.1427(c).

(g) Each exporter of renewable fuel must fulfill any 2014 ERVOs existing as of September 16, 2014 for which RINs have not yet been retired by the compliance demonstration deadline for the 2013 compliance period, and must demonstrate compliance with such ERVOs pursuant to § 80.1427(c).

[75 FR 14863, Mar. 26, 2010, as amended at 75 FR 26042, May 10, 2010; 79 FR 42115, July 18, 2014]

§ 80.1431 Treatment of invalid RINs.

(a) *Invalid RINs.* (1) An invalid RIN is a RIN that is any of the following:

- (i) A duplicate of a valid RIN.
- (ii) Was based on incorrect volumes or volumes that have not been standardized to 60 °F.
- (iii) Has expired, as provided in § 80.1428(c).
- (iv) Was based on an incorrect equivalence value.
- (v) Deemed invalid under § 80.1467(g).
- (vi) Does not represent renewable fuel as defined in § 80.1401.
- (vii) Was assigned an incorrect “D” code value under § 80.1426(f) for the associated volume of fuel.
- (viii) [Reserved]
- (ix) Was otherwise improperly generated.

(2) In the event that the same RIN is transferred to two or more parties, all such RINs are deemed invalid, unless EPA in its sole discretion determines that some portion of these RINs is valid.

(b) Except as provided in § 80.1473, the following provisions apply in the case of RINs that are invalid:

(1) Upon determination by any party that RINs owned are invalid, the party must keep copies and adjust its records, reports, and compliance calculations in which the invalid RINs were used. The party must retire the invalid RINs in the applicable RIN transaction reports under § 80.1451(c)(2) for the quarter in which the RINs were determined to be invalid.

(2) Invalid RINs cannot be used to achieve compliance with the Renew-

able Volume Obligations of an obligated party or exporter, regardless of the party's good faith belief that the RINs were valid at the time they were acquired.

(3) Any valid RINs remaining after invalid RINs are retired must first be applied to correct the transfer of invalid RINs to another party before applying the valid RINs to meet the party's Renewable Volume Obligations at the end of the compliance year.

(c) Notwithstanding paragraph (b) of this section, improperly generated RINs may be used for compliance provided that all of the following conditions and requirements are satisfied and the renewable fuel producer or importer who improperly generated the RINs demonstrates that the conditions and requirements are satisfied through the reporting and recordkeeping requirements set forth below, that:

(1) The number of RINs generated for a batch exceeds the number of RINs that should have been properly generated.

(2) The RINs were improperly generated as a result of a broken meter, an inadvertent temperature correction error, or an inadvertent administrative error.

(3) The renewable fuel producer or importer had in place at the time the RINs were improperly generated a quality assurance/quality control plan designed to ensure that process measuring equipment such as meters and temperature probes are properly maintained and to prevent inadvertent administrative errors.

(4) The renewable fuel producer or importer has taken any appropriate additional steps to prevent similar violations from occurring in the future.

(5) The improperly generated RINs have been transferred to another party.

(6) The renewable fuel producer or importer has not improperly generated RINs for the reasons described in paragraph (c)(2) of this section on more than five batches during any calendar year.

(7) All of the following remedial actions have been implemented within 30 days of the EMTS submission date of the improper RIN generation:

(i) The renewable fuel producer or importer retires an equal number of

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valid RINs with the same D Code and RIN year as the properly generated RINs, using an EMTS retire code of 110.

(ii) The renewable fuel producer or importer reports all the following information to EPA via EMTS, which EPA may make publicly available:

- (A) Company name.
 - (B) Company ID.
 - (C) Facility name.
 - (D) Facility ID.
 - (E) The date the renewable fuel was produced.
 - (F) The date the RINs were originally generated.
 - (G) The number of RINs generated.
 - (H) The number of RINs improperly generated.
 - (I) RIN year.
 - (J) D codes of generated RINs.
 - (K) Batch numbers.
 - (L) EMTS Transaction ID of the original generation.
 - (M) An explanation of how the violation occurred, and why the improperly generated RINs meet the criteria in paragraph (c)(2) of this section.
 - (N) Steps taken to prevent similar violations from occurring in the future.
 - (O) Information under paragraphs (c)(3), (c)(4), and (c)(5) of this section.
 - (P) Any additional information the Administrator may require.
- (8) The renewable fuel producer or importer maintains all records relating to the improper RIN generation and the associated remedial actions taken, including but not limited to any of the following:
- (i) All information regarding the generation of invalid RINs, including information that is sufficient to demonstrate that the improperly generated RINs meet the criteria in paragraph (c)(2) of this section.
 - (ii) Documents demonstrating that the renewable fuel producer or importer has implemented the quality control/quality assurance plan required in paragraph (c)(3) of this section, and has taken all appropriate additional steps to prevent similar violations from occurring in the future.
 - (iii) All correspondence with EPA.
 - (iv) All EMTS transactions (Generation, Buy, Sell and Retire).
 - (v) All Product Transfer Documents (PTDs).

(d) If EPA determines that a renewable fuel producer improperly generated RINs but did not meet the requirements set forth in paragraph (c) of this section, then the requirements of paragraph (b) of this section apply from the moment that the invalid RINs were generated in EMTS. Once the RIN generator has identified improperly generated RINs to EPA, then EPA may remove these improperly generated RINs from EMTS.

[75 FR 14863, Mar. 26, 2010, as amended at 77 FR 1355, Jan. 9, 2012; 79 FR 42115, July 18, 2014]

§ 80.1432 Reported spillage or disposal of renewable fuel.

(a) A reported spillage or disposal under this subpart means a spillage or disposal of renewable fuel associated with a requirement by a federal, state, or local authority to report the spillage or disposal.

(b) Except as provided in paragraph (c) of this section, in the event of a reported spillage or disposal of any volume of renewable fuel, the owner of the renewable fuel must retire a number of RINs corresponding to the volume of spilled or disposed of renewable fuel multiplied by its equivalence value.

(1) If the equivalence value for the spilled or disposed of volume may be determined pursuant to § 80.1415 based on its composition, then the appropriate equivalence value shall be used.

(2) If the equivalence value for a spilled or disposed of volume of renewable fuel cannot be determined, the equivalence value shall be 1.0.

(c) If the owner of a volume of renewable fuel that is spilled or disposed of and reported establishes that no RINs were generated to represent the volume, then no RINs shall be retired.

(d) A RIN that is retired under paragraph (b) of this section:

(1) Must be reported as a retired RIN in the applicable reports under § 80.1451.

(2) May not be transferred to another person or used by any obligated party to demonstrate compliance with the party's Renewable Volume Obligations.

Message

From: Pugliese, Holly [pugliese.holly@epa.gov]
Sent: 2/7/2019 2:12:31 PM
To: Cohen, Janet [cohen.janet@epa.gov]
Subject: RFS hardship/exemptions controls
Attachments: 018-001-0248.pdf; 18-000-3818.pdf; 18-000-4709.pdf; 18-000-6133.pdf; 18-000-6283.pdf; 18-000-6358.pdf; 18-000-6818.pdf; 18-000-7496.pdf; 18-000-8567.pdf; 18-000-9747.pdf; 19-000-2105.pdf; 19-000-2225.pdf

Hi Janet. Tanya tells me there is a push to get all of our overdue RFS controls done. She also tells me that Ben talked to you and Byron about these and that supposedly you have all of the info needed to move forward with responses. Attached are the 12 that I think that fall in this category that are on my list. Can you look through these when you get a chance and let me know what you think? Three of these - 9747, 0248, and 8567, are for Wehrum's signature.

Sorry about this....

Holly Pugliese
Office of Transportation and Air Quality
US EPA
pugliese.holly@epa.gov

Wed Apr 04 19:19:07 EDT 2018
CMS.OEX@epamail.epa.gov
FW: Small Refinery Exemption and the RFS
To: "cms.oex@domino.epamail.epa.gov" <cms.oex@domino.epamail.epa.gov>

From: Hope, Brian
Sent: Wednesday, April 4, 2018 11:19:05 PM (UTC+00:00) Monrovia, Reykjavik
To: CMS.OEX
Subject: FW: Small Refinery Exemption and the RFS

From: Alexis Dunnum [mailto:aDunnum@nfudc.org]
Sent: Wednesday, April 04, 2018 12:40 PM
To: Pruitt, Scott <Pruitt.Scott@epa.gov>
Cc: Anne Steckel <asteckel@nfudc.org>
Subject: RE: Small Refinery Exemption and the RFS

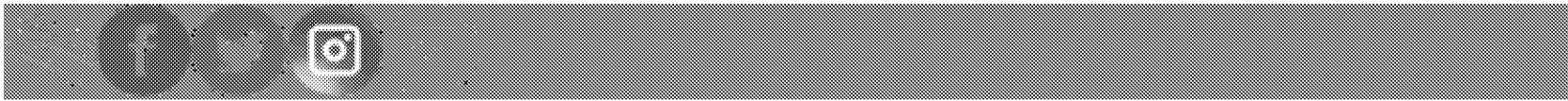
Dear Administrator Pruitt,

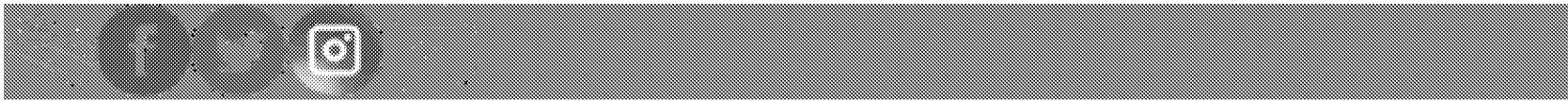
Please see the attached letter from the National Farmers Union regarding the small refinery exemption issue and the RFS.

Please let us know if you have any questions.

Thank you,

Alexis Dunnum
Executive Assistant
National Farmers Union
20 F Street NW, Suite 300
Washington, DC 20001
202.554.1600







April 4, 2018

The Honorable Scott Pruitt
 Administrator
 U.S. Environmental Protection Agency
 1200 Pennsylvania Avenue, N.W.
 Mail Code 1101A
 Washington, DC 20460|
 Pruitt.scott@Epa.gov

Re: Small Refinery Exemption

Dear Administrator Pruitt:

Recent reports indicate that you are receiving an increasing number of requests for small refiner exemptions under the Renewable Fuel Standard (RFS) program. Additional requests are expected after a report that the U.S. Environmental Protection Agency (EPA) granted an exemption to one of the nation's largest oil refining companies for its 2016 obligation.¹ EPA has reportedly granted "hardship waivers" to three of Andeavor's refineries despite the corporation's net profits of \$1.5 billion last year.² "Hardship waivers" were not designed for large corporations who net billions in profit each year. The National Farmers Union (NFU) is deeply disturbed by these reports, and requests that EPA cease granting these waivers.

NFU is a staunch proponent of the RFS and its benefits to family farmers and their communities. Exempting refiners from RFS compliance essentially waives away demand for corn at a time when family farmers need to significantly cut into corn oversupply and is certainly contrary to the intent of the RFS. Your actions appear to fly in the face of the Administration's numerous promises to family farmers and rural communities to support the RFS.

EPA is required to "ensure" transportation fuel sold in the United States includes the applicable volume of renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-

¹ Jarrett Renshaw and Chris Prentice, *Exclusive: EPA gives giant refiner a 'hardship' waiver from regulation*, Reuters, Apr. 3, 2018, <https://www.reuters.com/article/us-usa-biofuels-epa-refineries-exclusive/exclusive-epa-gives-giant-refiner-a-hardship-waiver-from-regulation-idUSKCN1HA21P>.

² *Id.*

based diesel.³ Congress gave EPA limited waiver authority to reduce the applicable volumes.⁴ To use this waiver authority, EPA must comply with procedural and substantive statutory requirements. EPA has utilized this authority in reducing the statutory volumes for renewable fuel and, since 2016, has set the RFS volumes based on what it found were “reasonably attainable.”⁵ EPA also found that the volumes it was using to set the standards would not have significant economic impacts on small refiners.⁶

Separately, the statute provided a temporary exemption from the annual RFS requirements for small refineries, defined as a refinery whose average aggregate daily crude oil throughput does not exceed 75,000 barrels per day.⁷ This exemption can be extended based on a finding by the U.S. Department of Energy (DOE) or based on a petition from the small refinery. These extensions are to be based on a finding that compliance with RFS obligations will impose a “disproportionate economic hardship” on the refinery. EPA is required to account for these small refinery exemptions when it sets the standards.⁸

Reports indicate that up to 30 small refinery exemption requests may be pending at EPA,⁹ which can be compared to the 13 requests EPA indicated it received for the 2014 standards.¹⁰ The statute, however, only allows for “extensions” of these exemptions, not for “new” exemptions years after the temporary one expired. This exemption was to allow small refineries more time to prepare, but the RFS program has been in effect for over ten years. The American Petroleum Institute (API) acknowledges “refiners have had ample time to adjust their businesses to operate” under the RFS.¹¹ It cannot be that Congress intended for small refineries to seek new exemptions so many years into the program. Nor should small refineries be allowed to game the system by coming in and out of the program based on market fluctuations (or a change in administration). Given the lack of information, it is not clear what grounds EPA is claiming to grant these exemptions.

Even more troubling, EPA is granting these exemptions *after* the volumes have been set (and apparently even *after* the compliance deadlines have passed in the case of Andeavor’s small refinery exemptions).¹² In so doing, this results in a reduction of the applicable volumes set by EPA, improperly waiving additional volumes.

³ 42 U.S.C. § 7545(o)(2)(A)(i); *see also id.* § 7545(o)(3)(B)(i).

⁴ *Id.* § 7545(o)(7).

⁵ *See, e.g.*, 82 Fed. Reg. 58,486, 58,513-58,514 (Dec. 12, 2017).

⁶ *See, e.g., id.* at 58,526. Several studies, including EPA’s own analysis, have concluded that RIN costs are largely recovered by refineries.

⁷ 42 U.S.C. § 7545(o)(1)(K), (o)(9).

⁸ 40 C.F.R. § 80.1405(c).

⁹ We believe the bulk of these requests relate to the 2017 volume requirements.

¹⁰ 81 Fed. Reg. 89,746, 89,803 (Dec. 12, 2016). As further discussed below, EPA has not provided the public with complete information on the small refinery exemptions. However, EPA has indicated that only 13 small refineries received extensions based on the DOE study. 80 Fed. Reg. 77,420, 77,510 n.222 (Dec. 14, 2015).

¹¹ *See* API Aug. 31, 2017 Comments at 2 (EPA-HQ-OAR-2017-0091-3647).

¹² It is unclear if this request was made to eliminate a deficit carryover from 2016 into 2017. If so, this also potentially allows the refinery to avoid the statutory limits on when it can carry a deficit.

These additional waivers appear to be significant. According to the U.S. Energy Information Administration (EIA), the three “small refineries” owned by Andeavor represent over 2.3 billion gallons of production capacity,¹³ resulting in a reduction of the 2016 RFS requirements by almost 200 million ethanol-equivalent gallons.¹⁴ This approval also comes *after* the U.S. Court of Appeals for the District of Columbia Circuit held that EPA misapplied its waiver authority when it set the 2016 renewable fuel volume requirement.¹⁵ And, this is in addition to the 390 million RINs that already did not need to be retired based on exemptions previously granted for 2016.¹⁶ Estimates indicate that the requests that have been submitted could represent a reduction of approximately 1 billion gallons of renewable fuel for 2017.¹⁷ But, EPA and its implementing regulations are required to “ensure” the applicable volumes are met. Even if there were some grounds to grant these exemptions, EPA can no longer avoid its obligation to follow Congress’s directives.

These exemptions also have a deleterious impact on volumes needed in later years, given the ability of obligated parties to use prior-year RINs. EPA has acknowledged that the grant of these exemptions, after the fact, allow additional RINs to enter the market.¹⁸ Even API has noted that “[s]mall refinery exemptions, especially when granted retroactively, introduce additional uncertainty and RIN market disruptions.”¹⁹ Reducing the actual volumes required and market uncertainty have significant adverse impacts on the rural economy. It also punishes those that have responded to Congress’s directives and EPA’s own requirements, rewarding those that have refused to acknowledge this country’s need for diverse sources of energy, including renewable energy.²⁰

Equally concerning is that these actions have purportedly been taken without any transparency, which violates central tenets of responsible governance. We cannot hold our officials accountable for their actions when they are taken behind closed doors. Indeed, the

¹³ EIA, List of U.S. Refineries, 2017, *available at* [Oil Crude and Petroleum Products Explained: Refining Crude Oil](https://www.eia.gov/energyexplained/index.cfm?page=oil_refining#tab4), https://www.eia.gov/energyexplained/index.cfm?page=oil_refining#tab4 (last updated June 22, 2017). One of the Andeavor refineries is listed by EIA as having 73,800 barrels/day capacity, just under the 75,000 barrel/day threshold for small refiners under the RFS.

¹⁴ This is based on an average yield for gasoline and diesel fuel production for U.S. refineries based on EIA data (<https://www.eia.gov/dnav/pet/pet.pnp.pct.dc.nus.pct.a.htm>).

¹⁵ EPA must still “true-up” the 2016 renewable fuel volume requirement in light of the Court’s decision.

¹⁶ 82 Fed. Reg. at 58,393 n.28.

¹⁷ Renewable Fuels Association, *EPA Actions on the RFS are Destroying Demand for Ethanol and Corn* (Mar. 2018), *available at* [http://www.ethanolrfa.org/wp-content/uploads/2018/03/EPA-Demand-Destruction .pdf](http://www.ethanolrfa.org/wp-content/uploads/2018/03/EPA-Demand-Destruction.pdf).

¹⁸ 82 Fed. Reg. at 58,393 n.28, 58,494. Reuters reported that Andeavor sold some 100 million RINs to its competitors in recent weeks that could have been used to meet these obligations. *See supra* n.1.

¹⁹ API Feb. 12, 2018 Letter, *available at* <http://www.api.org/~media/Files/News/Letters-Comments/2017/API-Letter-2-12-18.pdf>.

²⁰ While acknowledging its obligation to ensure the applicable volumes, EPA declined to consider comments on its process and the impacts of granting the small refinery exemptions after it sets the standards. EPA, *Renewable Fuel Standard Program Standards for 2018 and Biomass-Based Diesel Volume for 2019: Response to Comments*, EPA-420-R-17-007, at 217 (Dec. 2017).

Page 4

statute requires public notice and comment for waivers under the statute, but EPA is granting these exemptions (and therefore waivers) without any public input.

This Administration has provided little, if any, information on small refinery exemptions, which is causing speculation and market disruptions that you have indicated needs to be addressed.²¹ NFU supports the request submitted by the Renewable Fuels Association in January of this year for more information on the small refinery exemptions, and greater transparency and public input on the process.²²

In short, NFU asks that EPA cease granting these waivers or act to adjust for these additional waivers and comply with its obligations under the statute. EPA should also adjust its process in the future to ensure that these exemptions do not reduce the applicable volumes required under the RFS. We look forward to working with you to address this important issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Roger Johnson". The signature is fluid and cursive, with the first name "Roger" and last name "Johnson" clearly distinguishable.

Roger Johnson

President

²¹ The prior Administration provided some guidance on how it handles small refinery exemptions, but EPA has not updated its small refinery exemption webpage since May 2017. <https://www.epa.gov/renewable-fuel-standard-program/renewable-fuel-standard-exemptions-small-refineries> (last updated May 16, 2017).

²² EPA has already indicated that it did not deem all information regarding the requests constituted confidential business information. 81 Fed. Reg. 80,828, 80,909 (Nov. 16, 2017) (proposing to “codify a *determination* that basic information related to EPA actions on petitions for RFS small refinery and small refiner exemptions may not be claimed as confidential business information”) (emphasis added). This would also provide more information on RIN availability and provide greater transparency in the RIN market. Thus, it is unclear why EPA has declined to provide more information to the public, even in light of Freedom of Information Act requests. *See supra* n.1.

Message

From: Nelson, Karen [nelson.karen@epa.gov]
Sent: 2/6/2019 9:51:30 PM
To: Hengst, Benjamin [Hengst.Benjamin@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]
Subject: RE: last call on briefing?
Attachments: RFS Small Refinery Hardship Briefing for Administrator Wheeler_2.6.19.pptx

I've attached a standalone version, and moved the Share Point version from the "Working Versions" folder to the "Administration Transition" folder within the "Briefings" folder, also [here](#).

From: Hengst, Benjamin
Sent: Wednesday, February 6, 2019 4:44 PM
To: Nelson, Karen <nelson.karen@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>
Subject: RE: last call on briefing?

Which doc do I use? Can one of you pls send link or doc? thanks!

From: Nelson, Karen
Sent: Wednesday, February 6, 2019 3:11 PM
To: Cohen, Janet <cohen.janet@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Subject: RE: last call on briefing?

I made one tiny grammatical edit on slide 3 – "authority and responsibility for decisions resides with EPA" taking off the 's' to make the verb agree with the two subjects – authority and responsibility – but it's nbd if it doesn't get fixed in the final. Just fyi.

From: Cohen, Janet
Sent: Wednesday, February 6, 2019 3:00 PM
To: Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Orlin, David <Orlin.David@epa.gov>
Subject: RE: last call on briefing?

Thanks Ben. My pen is down but if this is final can you please pick up your eraser and take the "DRAFT" out of the document title before you send it forward. Thanks. – j. -

From: Hengst, Benjamin
Sent: Wednesday, February 06, 2019 2:58 PM
To: Cohen, Janet <cohen.janet@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Orlin, David <Orlin.David@epa.gov>
Subject: RE: last call on briefing?

I will check with Chris, but I think this is GTG. Let's put pens down.

From: Cohen, Janet
Sent: Wednesday, February 6, 2019 2:51 PM
To: Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Orlin, David <Orlin.David@epa.gov>
Subject: last call on briefing?

I think I've got all your suggestions in this version. Thank you! Does anyone want to take one more look or should we call this the final version? Ben, does Chris want to see it again? Attaching both a linked and standalone version, in case one or other is more convenient for anyone.

- J. -

Message

From: Bunker, Byron [bunker.byron@epa.gov]
Sent: 12/6/2018 9:48:32 PM
To: Stahle, Susan [Stahle.Susan@epa.gov]
CC: Orlin, David [Orlin.David@epa.gov]; Nelson, Karen [nelson.karen@epa.gov]; Davis, Theresa [Davis.Theresa@epa.gov]; Manners, Mary [manners.mary@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]; Hengst, Benjamin [Hengst.Benjamin@epa.gov]
Subject: FW: Options for granting small refiner petitions
Attachments: RFS Small Refinery Hardship - Options for New Approval Criteria 3-10.docx

Hi Sue,

Sorry for not flagging this sooner. I had not realized what we were saying until I read the language today. Attached is the document that I believe was the information provided to the Administrator to inform his decision conveyed in the e-mail from Mandy. Ben's note to her captured what was orally told to Ben, but this one-pager was the information that went up earlier in the month through our Acting AA to the Administrator.

Thanks,

Byron

Byron Bunker
 Director Compliance Division
 Office of Transportation and Air Quality
 Environmental Protection Agency
 2000 Traverwood Drive
 Ann Arbor, MI 48105
Bunker.Byron@epa.gov
 Phone: (734) 214-4155

Ex. 6 Personal Privacy (PP)

From: Grundler, Christopher
Sent: Friday, March 10, 2017 2:42 PM
To: Bunker, Byron <bunker.byron@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Subject: FW: Options for granting small refiner petitions

Thanks everyone. Stay tuned

Christopher Grundler, Director
 Office of Transportation and Air Quality
 U.S. Environmental Protection Agency
 202.564.1682 (Washington, DC)
 734.214.4207 (Ann Arbor, MI)

From: Grundler, Christopher
Sent: Friday, March 10, 2017 2:41 PM

To: Dunham, Sarah <Dunham.Sarah@epa.gov>

Subject: Options for granting small refiner petitions

Sarah- for your review. OGC has reviewed. If ok, below is a suggested note to send to whomever

Draft Transmittal Note:

Ex. 5 Deliberative Process (DP)

Christopher Grundler, Director
Office of Transportation and Air Quality
U.S. Environmental Protection Agency
202.564.1682 (Washington, DC)
734.214.4207 (Ann Arbor, MI)

Message

From: Parsons, Nick [Parsons.Nick@epa.gov]
Sent: 11/14/2018 7:48:25 PM
To: Cohen, Janet [cohen.janet@epa.gov]; Stahle, Susan [Stahle.Susan@epa.gov]; Michaels, Lauren [Michaels.Lauren@epa.gov]; Nelson, Karen [nelson.karen@epa.gov]; McKenna, Chris [McKenna.Chris@epa.gov]; Burkholder, Dallas [burkholder.dallas@epa.gov]
Subject: RE: first very rough draft of BW briefing for your review
Attachments: 11_13_18 draft SRE 2018 NLP.PPTX

Updated numbers on slide 6. If anyone's curious, I can show you the numbers I used to come up w/ my estimates.

- Nick

From: Cohen, Janet
Sent: Tuesday, November 13, 2018 5:15 PM
To: Stahle, Susan <Stahle.Susan@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; McKenna, Chris <mckenna.chris@epa.gov>; Burkholder, Dallas <burkholder.dallas@epa.gov>
Subject: first very rough draft of BW briefing for your review

All – unfortunately I got pulled into something else and ran out of time to come back to the multiple placeholders in here. So apologies, but in interest of time I'm asking you to get started with the review. Please everyone think about whether anything important is missing and look at content, flow, etc. as usual. Also:

Sue/Lauren/Karen – please send me your thoughts on legal risk

Nick – can you please take a look at the numbers and guess at what they will look like for **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP)

Thanks!

- J. -

Ps I'm sending a standalone copy because Sharepoint was crashing my computer again today so if you have comments please just mark up this version and send it back to me, or a hard copy is fine if that's easier.

Message

From: Nelson, Karen [nelson.karen@epa.gov]
Sent: 10/16/2018 5:45:36 PM
To: Cohen, Janet [cohen.janet@epa.gov]; Stahle, Susan [Stahle.Susan@epa.gov]; Michaels, Lauren [Michaels.Lauren@epa.gov]; Piotrowski, Greg [piotrowski.greg@epa.gov]; McKenna, Chris [McKenna.Chris@epa.gov]; Weihrauch, John [Weihrauch.John@epa.gov]; Sutton, Tia [sutton.tia@epa.gov]; Hengst, Benjamin [Hengst.Benjamin@epa.gov]
Subject: Draft Response Letters to **Ex. 4 CBI** re. New Vintage RINs & Prior Year Petitions
Attachments: DRAFT_Response Denying New Vintage RINs for 2016 SRE_8.1.18.docx; **Ex. 4 CBI** Letter 4.8.18_Request for New Vintage RINS.pdf; DRAFT_Letter Declining Petition Review-Mootness_8.10.18.docx

Hi Team,

Here are the current drafts of the **Ex. 4 CBI** response letters. In these drafts, I have incorporated most of Nick's edits, I've left a few for further discussion. I've also attached the letter than **Ex. 4 CBI** sent to Byron about the new vintage RINs. I also have an email handy with all the other petitions they submitted (very easily accessible at the moment), in case anyone wants to see those but doesn't want to go digging in either sharepoint or email. Just let me know and I'll forward that along.

Thanks!
-Karen

Thank you for your time.

Sincerely,
Karen Nelson
Compliance Division
(734) 214-4657

Message

From: Manners, Mary [manners.mary@epa.gov]
Sent: 7/20/2018 3:40:58 PM
To: Hengst, Benjamin [Hengst.Benjamin@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]
CC: McKenna, Chris [McKenna.Chris@epa.gov]; Nelson, Karen [nelson.karen@epa.gov]
Subject: RE: Small refinery hardship options briefings
Attachments: Margo briefing on RFS small refinery hardship petitions.doc; 8_14_14 Grundler briefing on 10 remaining hardship petitions.docx

Hi Ben—

Since Chris McKenna is out today, I scoured one of the DC share drives where the hardship info is stored and concur with Janet that he has incredibly great files – very organized – and I was able to see some of those early briefings but, as Janet stated, they are very detailed and refinery specific rather than approach or policy oriented. That being said, I included a Margo briefing from the “petitions for 2011-12 extensions” folder and a Grundler briefing from the “petitions for 2013 extensions” folder. I also included language below regarding the small refinery definition change in Pathways II.

Small refinery definition change in Pathways II (79 FR 42152, July 18, 2014)

“Small Refinery”:

Section 211(o)(9)(A) of the Clean Air Act provides an exemption from RFS requirements through 2010 for “small refineries,” defined as refineries having an average aggregate daily crude oil throughput “for a calendar year” that does not exceed 75,000 barrels. It also provides for possible extensions of this exemption, through individual petitions to EPA under CAA section 211(o)(9)(B). In EPA’s March 26, 2010 regulations implementing the EISA amendments to the RFS program we specified in the regulatory definition of “small refinery” that the 75,000 bpd threshold determination should be calculated based on information from calendar year 2006. At the beginning of the program, having a single year in which to make this determination simplified the calculations and helped to ensure that all refineries were treated similarly. However, we no longer believe that it is appropriate that refineries satisfying the 75,000 bpd threshold in 2006 should be eligible for extensions to their small refinery RFS exemption if they no longer meet the 75,000 bpd threshold. Allowing such facilities to qualify for an exemption extension, while not allowing similarly sized facilities that have not grown since 2006 to qualify for an exemption, does not appear fair, nor

does it further the objectives of the statute to target relief to only truly small facilities. Therefore, we proposed modifying the definition of small refinery so that the crude throughput threshold of 75,000 bpd must apply in 2006 and in all subsequent years. We also proposed specifying in § 80.1441(e)(2)(iii) that in order to qualify for an extension of its small refinery exemption, a refinery must meet the definition of "small refinery" in § 80.1401 for all full calendar years between 2006 and the date of submission of the petition for an extension of the exemption.

We proposed that that these changes would not affect any existing exemption extensions under CAA section 211(o)(9)(B); rather, they would apply at such time as any approved exemption extension expires and the refinery at issue seeks a further exemption extension. No further extension would be permitted unless the revised crude oil throughput specifications were satisfied.

We received two comments on our proposed small refinery revisions, both supporting EPA's proposed change. After further consideration of this matter, we believe that the proposal could unfairly disqualify a refinery from eligibility for small refinery relief based only on a single year's production since 2006. We do not believe it would be appropriate to treat two refineries whose recent operating conditions were equivalent differently if one refinery exceeded 75,000 bpd in a single year as much as 8 years ago. Considering this concern and the intent in our proposal to treat similarly sized facilities the same, we are modifying the final rule to require that throughput be no greater than 75,000 barrels in the most recent full calendar year prior to an application for hardship. We will also clarify that a qualifying small refinery can't be projected to exceed the threshold in the year or years for which it is seeking an exemption. Production that exceeds the average aggregate 75,000 barrel per date

limitation during an approved exemption period would invalidate the exemption. With these modifications, we believe we will better address our primary concern from proposal of treating refineries with similar performance the same. We believe that these changes reasonably implement the statutory definition of "small refinery," which indicates that the 75,000 barrel aggregate daily crude oil throughput is for "a calendar year," but does not specify which calendar year should be the focus of inquiry. The final rule places the focus on the time period immediately prior to and during the desired exemption period, which we believe is most appropriate given the objectives of the provision.

From: Hengst, Benjamin
Sent: Friday, July 20, 2018 11:00 AM
To: Cohen, Janet <cohen.janet@epa.gov>
Cc: McKenna, Chris <McKenna.Chris@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Manners, Mary <manners.mary@epa.gov>
Subject: RE: Small refinery hardship options briefings

Ok—if you have anything you think worthwhile, pls send along! Much appreciated.

From: Cohen, Janet
Sent: Friday, July 20, 2018 10:32 AM
To: Hengst, Benjamin <Hengst.Benjamin@epa.gov>
Cc: McKenna, Chris <McKenna.Chris@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Manners, Mary <manners.mary@epa.gov>
Subject: Re: Small refinery hardship options briefings

Ben, we were well into the 2013 compliance year when it got my first small refinery volunteer opportunity. So any briefings from earlier would have gone through Chris M. Fortunately he kept incredibly great files and I was able to see some of those early briefings. I haven't looked at them for a long time but the ones I'm remembering were pretty detailed and refinery specific rather than approach or policy oriented. Anyway I'm out today but will do a good look through old files on Monday. I do recall several briefings in the 2014-2015 time frame that let's pled at questions of approach like partial waivers. - J. -

On Jul 20, 2018, at 8:53 AM, Hengst, Benjamin <Hengst.Benjamin@epa.gov> wrote:

Hey gang—

I'm looking for an old presentation, specifically any presentation from way back (maybe 2012 or 2013?) that reviews the options for how to process small refinery exemption petitions. I looked through my files but don't have anything there. If you guys have a spare moment, could you see if you have anything? I'd like to do some brainstorming on this topic next week and I thought it would be good to dig up something that documents what we thought about the options previously (e.g., pros/cons of a "reject them all" approach, how we settled on the approach from the last Administration).

Thanks

Ben

Message

From: Sutton, Tia [sutton.tia@epa.gov]
Sent: 8/29/2018 9:33:05 PM
To: Stahle, Susan [Stahle.Susan@epa.gov]; Hengst, Benjamin [Hengst.Benjamin@epa.gov]; Bunker, Byron [bunker.byron@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]; Michaels, Lauren [Michaels.Lauren@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]
CC: Orlin, David [Orlin.David@epa.gov]
Subject: RE: Reconsideration Petition
Attachments: AX-18-000-9828_incoming.pdf

Here's the version that just came in via CMS – it's the same as what Sue sent yesterday, but passing along in case folks want the CMS number. (Tanya had it 'closed' as a control because it's a petition, not regular correspondence.)

From: Stahle, Susan
Sent: Tuesday, August 28, 2018 4:37 PM
To: Hengst, Benjamin <Hengst.Benjamin@epa.gov>; Sutton, Tia <sutton.tia@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>
Cc: Orlin, David <Orlin.David@epa.gov>
Subject: FW: Reconsideration Petition

FYI

Susan Stahle
 Air and Radiation Law Office
 Office of General Counsel
 U.S. Environmental Protection Agency
 WJCN-7502B
 202-564-1272

From: sandra@francoenvironmentallaw.com [mailto:sandra@francoenvironmentallaw.com]
Sent: Tuesday, August 28, 2018 4:24 PM
To: Paul.Cirino@usdoj.gov; Stahle, Susan <Stahle.Susan@epa.gov>; Eric.Hostetler@usdoj.gov
Cc: jm08201954@gmail.com
Subject: FW: Reconsideration Petition

Per our discussion, thanks.

From: Muys, Jr., Jerome C. <jmuys@sandw.com>
Sent: Tuesday, July 31, 2018 10:50 PM
To: 'Wheeler.andrew@Epa.gov' <Wheeler.andrew@Epa.gov>
Subject: Reconsideration Petition

Acting Administrator Wheeler,

Please see attached petition for reconsideration being submitted on behalf of the Producers of Renewables United for Integrity Truth and Transparency.

Thank you,

Jerome C. Muys, Jr.
Attorney at Law

Sullivan & Worcester LLP
1666 K Street, NW
Washington, DC 20006
T 202 370 3920
F 202 293 2275
jmuys@sandw.com
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www.zag-sw.com

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Wed Aug 08 09:40:12 EDT 2018
CMS.OEX@epamail.epa.gov
FW: Reconsideration Petition
To: "cms.oex@domino.epamail.epa.gov" <cms.oex@domino.epamail.epa.gov>

From: Hope, Brian
Sent: Wednesday, August 8, 2018 1:40:10 PM (UTC+00:00) Monrovia, Reykjavik
To: CMS.OEX
Subject: FW: Reconsideration Petition

From: Muys, Jr., Jerome C. [mailto:jmuys@sandw.com]
Sent: Tuesday, July 31, 2018 10:50 PM
To: Wheeler, Andrew <wheeler.andrew@epa.gov>
Subject: Reconsideration Petition

Acting Administrator Wheeler,

Please see attached petition for reconsideration being submitted on behalf of the Producers of Renewables United for Integrity Truth and Transparency.

Thank you,

Jerome C. Muys, Jr.
Attorney at Law

Sullivan & Worcester LLP
1666 K Street, NW
Washington, DC 20006
T 202 370 3920
F 202 293 2275
jmuys@sandw.com

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41-45 Rothschild Blvd., Beit Zion
Tel Aviv, 65784 Israel

T +972 3 795 5555
F +972 3 795 5550
jmuys@zag-sw.com
www.zag-sw.com

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July 31, 2018

Via Electronic Mail

The Honorable Andrew Wheeler
Acting Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Mail Code: 1101A
Washington, DC 20460

RE: Petition for Reconsideration and Rulemaking and Request for Administrative Stay
regarding Small Refinery Exemptions

Dear Acting Administrator Wheeler:

Pursuant to Section 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. § 7607(d)(7)(B), and the Administrative Procedure Act, Producers of Renewables United for Integrity Truth and Transparency (Petitioner)¹ respectfully submits this Petition for Reconsideration and Rulemaking and Request for Administrative Stay. This petition relates to EPA's recent handling of the small refinery exemption under the Renewable Fuel Standard (RFS) program. We request that EPA reconsider and revise the following final agency actions:

- 1) EPA's decision to allow obligated parties to issue 2018 Renewable Identification Numbers (RINs) related to production of biofuels that did not occur in 2018 ("Small Refinery Generated RINs");²
- 2) 40 C.F.R. § 80.1441; and
- 3) The volumes used to set the percentage standards by EPA for 2016, 2017 and 2018.³

¹ Petitioner includes biomass-based diesel producers that participate in the RFS program. These companies generate and/or hold RINs. As a result of EPA's actions, RIN values have substantially decreased. In addition, allowing these invalid RINs to enter the market reduces the actual gallon volumes that will be required in 2018, adversely affecting biofuel companies selling into that market.

² Jarrett Renshaw & Chris Prentice, *U.S. EPA Grants Refiners Biofuel Credits to Remedy Obama-Era Waiver Denials*, Reuters, May 31, 2018, <https://www.reuters.com/article/us-usa-biofuels-waivers-exclusive/exclusive-us-epa-grants-refiners-biofuel-credits-to-remedy-obama-era-waiver-denials-idUSKCN1IW1DW>.

³ We are aware of a pending petition for reconsideration related to 40 C.F.R. §80.1405 submitted by the Renewable Fuels Association et al. We agree with the basic argument of this petition that EPA can, and must, make up for the lost volumes as a result of the recent grants of extensions of the small refinery exemption.

We believe EPA's recent handling of the small refinery exemptions violates the requirements under the Clean Air Act, requiring reconsideration of these final agency actions and invalidation of any RINs generated based on EPA's impermissible actions.

EPA's grant of retroactive extensions long after the compliance period and allowance of Small Refinery Generated RINs have had a significant impact on the market, requiring an immediate stay of any transfer or use of the 2018 Small Refinery Generated RINs and halting of any additional grants of small refinery exemptions or revival of prior year RINs in response to requests by small refineries. A July 12, 2018 letter to Senator Grassley from EPA indicates that EPA continues to grant exemptions for the 2016 and 2017 compliance years, and, thus, EPA may continue to do so months after the compliance period for those years has ended. EPA must come into compliance with the Clean Air Act before it takes any further action related to small refinery exemptions.

The adverse impacts of EPA's actions have only been exacerbated by EPA's lack of transparency on its handling of the small refinery exemptions. EPA's failure to provide notice and comment on allowing Small Refinery Generated RINs violates the Clean Air Act's procedural requirements. EPA's refusal to provide information regarding the small refinery exemptions is also contrary to EPA's own prior determinations. As such, we also request that EPA finalize proposed regulation 40 C.F.R. § 80.1441(e)(2)(iv), which was part of the proposed Renewables Enhancement and Growth Support Rule, 81 Fed. Reg. 80,828, 80,934 (Nov. 16, 2016). There, EPA explained that they had made a "determination that basic information related to EPA actions on petitions for RFS small refinery and small refiner exemptions may not be claimed as confidential business information." *Id.* at 80,909. EPA was simply proposing to codify this determination.

BACKGROUND

I. The RFS and the Small Refinery Exemption

In 2007, the RFS was expanded to require that a *minimum* volume of transportation fuel sold or introduced into commerce in the United States include renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel. 42 U.S.C. § 7545(o). Congress has made clear that EPA's regulations must "ensure" these minimum applicable volume requirements are met. *Id.* § 7545(o)(2)(A)(i). "Regardless of the date of promulgation, the regulations ... shall contain compliance provisions applicable to refineries, blenders, distributors, and importers, as appropriate, to *ensure*" the volumes are met. *Id.* § 7545(o)(2)(A)(iii) (emphasis added). Congress again stated that EPA must "ensure" the volumes are met through the setting of the applicable percentages, often referred to as the renewable volume obligations or RVOs. *Id.* § 7545(o)(3)(B)(i).

The RFS is a "technology-forcing" mandate, but Congress included an increasing volume requirement over time, recognizing that the market may need to take actions to adjust. Congress gave small refineries a "temporary exemption" from the RVO requirements until calendar year 2011. 42 U.S.C. § 7545(o)(9)(A). A small refinery is a refinery with an average crude oil throughput of no more than 75,000 barrels per day. *Id.* § 7545(o)(1)(K). This exemption may be "extend[ed]" if (1) a required study by the U.S. Department of Energy (DOE) found a small

refinery eligible for the temporary exemption would be subject to “disproportionate economic hardship” if required to comply with the RFS requirements, or (2) EPA determines, based on a request from the small refinery and in consultation with the Secretary of Energy, that the small refinery will suffer “disproportionate economic hardship.” *Id.* § 7545(o)(9)(A)(ii), (9)(B). Small refineries may request an “extension” “at any time,” and EPA must act on the petition within 90 days. *Id.* § 7545(o)(9)(B)(i), (iii). In evaluating the petitions, EPA must consider the DOE study “and other economic factors.” *Id.* § 7545(o)(9)(B)(ii). The statute also provides that small refineries that “waive[] the exemption” are eligible to generate credits. *Id.* § 7545(o)(9)(C), (o)(5)(A)(iii). Any credits generated have a limited life of 12 months. *Id.* § 7545(o)(5)(C).

In 2010, EPA promulgated regulations to implement the 2007 amendments to the RFS program. 75 Fed. Reg. 14,670 (Mar. 26, 2010).⁴ EPA included a regulation outlining the process for small refineries to seek an extension of the temporary exemption. 40 C.F.R. § 80.1441. Under that regulation, a small refinery eligible for the temporary exemption was required to submit a verification to EPA by July 1, 2010. Those eligible refineries could obtain an extension based on the DOE study or based on a petition. For the latter, the petition “must specify the factors that demonstrate a disproportionate economic hardship and must provide a detailed discussion regarding the hardship the refinery would face in producing transportation fuel meeting the requirements of § 80.1405 *and the date the refiner anticipates that compliance with the requirements can reasonably be achieved at the small refinery.*” 40 C.F.R. § 80.1441(e)(2)(i) (emphasis added). To qualify for the extension, the refinery “must meet the definition of ‘small refinery’ in §80.1401 for the most recent full calendar year prior to seeking an extension *and must be projected to meet the definition of ‘small refinery’ in §80.1401 for the year or years for which an exemption is sought.*” *Id.* §80.1441(e)(2)(iii). “Failure to meet the definition of small refinery for any calendar year for which an exemption was granted would invalidate the exemption for that calendar year.” *Id.* The regulation speaks in prospective terms.

In 2010, EPA also assured the public that it will account for the volumes of gasoline and diesel “projected to be produced by exempt small refineries and small refiners” when setting the annual RVOs. 40 C.F.R. § 80.1405(c); 75 Fed. Reg. 76,790, 76,805 (Dec. 9, 2010); *see also* 75 Fed. Reg. at 14,716-14,717 (“Thus we have excluded their gasoline and diesel volumes from the overall nonrenewable gasoline and diesel volumes used to determine the applicable percentages until 2011.”); 77 Fed. Reg. 1319, 1324 (Jan. 9, 2012) (EPA “has also adjusted the final 2012 percentage standards to reflect the exemption of these small refineries from being RFS obligated parties in 2012.”).

Following the release of DOE’s small refinery study in 2009, Congress directed DOE to complete a reassessment and issue a revised report.⁵ Based on DOE’s study, it was recommended to extend the exemption for thirteen small refineries based on a disproportionate

⁴ 40 C.F.R. § 80.1441 was amended in 2014, 79 Fed. Reg. 42,128, 42,163 (July 18, 2014).

⁵ The Senate Appropriations Committee “directed [DOE] to reopen and reassess the Small Refineries Exemption Study by June 30, 2010,” listing a number of factors that the Committee intended DOE to consider in the revised study. S. Rep. No. 111-45 at 109 (2009); *see also* H.R. Conf. Rep. No. 111-278 at 126 (2009).

hardship if required to participate in the program.⁶ Those refineries were exempt from the 2011 and 2012 RVOs. EPA also indicated it adjusted the RVOs accordingly. 77 Fed. Reg. at 1323.

II. EPA's Recent Actions Regarding the Small Refinery Exemption.

On July 12, 2018, EPA sent a letter to Senator Grassley indicating that it had granted 19 exemptions for compliance year 2016 and 29 exemptions for compliance year 2017, but four remain pending at EPA. On May 31, 2018, it was reported that EPA has allowed two companies – Sinclair Oil and Holly Frontier – to generate 2018 RINs in light of a reversal of EPA's prior denial of an extension based on a decision by the Tenth Circuit in *Sinclair Wyoming Refining v. EPA*, 874 F.3d 1159 (10th Cir. 2017).⁷ In that case, the Tenth Circuit found that EPA could not require long-term "viability" to establish economic "hardship." Nothing in the Tenth Circuit's decision, however, required EPA to subsequently grant the extension requests where the compliance year has long been over. More important, nothing in the decision indicates that EPA had authority to allow these companies to generate 2018 RINs to account for RINs they submitted in 2015, which represents production in either 2014 or 2015.⁸

Each report regarding EPA's recent handling of the small refinery exemption has resulted in: (a) subsequent reports of additional refineries seeking exemptions and (b) a drop in RIN prices. Testimony before the Subcommittee on the Environment in the House Energy and Commerce Committee on July 25, 2018 verified that the retroactive nature of these exemptions has affected the RIN market.⁹

III. Statutory Provisions Governing Reconsideration

Under Section 307(d)(7)(B) of the Clean Air Act, the Administrator is required to grant a petition for reconsideration upon a demonstration that it was impracticable to raise a particular objection during the period for public comment (but within the time specified for judicial review),¹⁰ and the objection is of central relevance to the outcome of the rule. 42 U.S.C. § 7607(d)(7)(B). Reconsideration petitions are an appropriate forum to raise procedural violations. *Id.* § 7607(d)(9); *see also White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222 (D.C. Cir.), *cert. granted in part*, 135 S. Ct. 702 (2014). The Administrator also has the

⁶ Small Refinery Exemption Study: An Investigation into Disproportionate Economic Hardship, U.S. Department of Energy, March 2011.

⁷ Jarrett Renshaw & Chris Prentice, U.S. EPA Grants Refiners Biofuel Credits to Remedy Obama-Era Waiver Denials, Reuters, May 31, 2018.

⁸ Two other courts found "EPA's interpretation of 'disproportionate economic hardship' is reasonable." *Lion Oil Co. v. EPA*, 792 F.3d 978, 984 (8th Cir. 2015); *Hermes Consol., LLC v. EPA*, 787 F.3d 568, 575 (D.C. Cir. 2015). "[T]he relative costs of compliance alone cannot demonstrate economic hardship because all refineries face a direct cost associated with participation in the program. Of course, some refineries will face higher costs than others, but whether those costs impose disproportionate hardship on a given refinery presents a different question." *Hermes*, 787 F.3d at 575.

⁹ *See, e.g.*, Testimony of Gabriel E. Lade Center for Agricultural and Rural Development Iowa State University before the Subcommittee on Environment, House Energy and Commerce Committee, July 25, 2018, <https://docs.house.gov/meetings/IF/IF18/20180725/108610/HHRG-115-IF18-Wstate-LadeG-20180725.pdf>.

¹⁰ The time for seeking judicial review of a final agency action under the Clean Air Act is 60 days from the date of promulgation, approval or action, "except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise." 42 U.S.C. § 7607(b)(1).

authority to initiate reconsideration of an action even if he concludes that the standards of Section 307(d)(7)(B) have not been met. *See, e.g.*, 74 Fed. Reg. 66,470, 66,471 (Dec. 15, 2009) (granting reconsideration to clarify ambiguous definitions in regulation); 71 Fed. Reg. 14,665, 14,668 (Mar. 23, 2006) (granting petition for reconsideration due to confusion over EPA's methodology). EPA also must allow for petitions to amend or withdraw agency action under the Administrative Procedure Act, 5 U.S.C. § 553(e). Although a petition for reconsideration does not postpone the effectiveness of a rule, EPA may stay the effectiveness of a rule pending reconsideration, 42 U.S.C. § 7607(d)(7)(B), or through rulemaking.

Reconsideration is required here because EPA did not provide for notice and comment on its decision to allow Small Refinery Generated RINs. In addition, there are numerous grounds for objections that have arisen after EPA promulgated its small refinery exemption regulations and the RVOs in question related to EPA's handling of the small refinery exemption. These all require EPA to reconsider or revise its regulations and to true up the volume requirements for 2016, 2017 and 2018.

ARGUMENT

I. EPA Must Grant Reconsideration of its Decision to Reissue Prior-Year RINs.

A. The public could not raise its objections because EPA did not undergo notice and comment rulemaking.

Under EPA's regulations, the RIN-system is the means to show compliance with the RFS requirements. RINs are also intended to implement the credit program under the statute. In both cases, the statute requires EPA to promulgate *regulations*. Section 211(o)(2)(A)(iii) requires EPA's *regulations* to contain "compliance provisions" applicable to *refineries* to ensure the RVOs are met. 42 U.S.C. § 7545(o)(2)(A)(iii). Section 211(o)(5)(A) requires that EPA's *regulations* include a credit program. *Id.* § 7545(o)(5)(A). Promulgation of regulations requires notice and comment rulemaking. *See* 42 U.S.C. § 7607(d); *see also id.* § 7607(h) (stating intent of Congress that EPA "in promulgating any regulation under this chapter, shall ensure a reasonable period for public participation of at least 30 days"). Here, EPA has provided the public with no notice or opportunity to comment. This is in violation of the procedural requirements of the Clean Air Act and the Administrative Procedure Act.¹¹

EPA's regulations do not provide any process for small refineries to generate RINs. 40 C.F.R. § 80.1426. While EPA provides for some generation of RINs to address certain invalid RIN circumstances, those instances are not present here. Nor can EPA assert it has enforcement discretion to allow RIN generation by the small refineries since there is no claimed violation of the Act by the small refineries and, thus, no enforcement case.

¹¹ Because the statute requires "regulations," EPA cannot claim that it properly made this determination through an informal adjudication, which does not require public notice and comment. EPA has argued that "[i]nformal adjudications do not require notice and comment, *unless Congress directed an agency to provide such in a particular statute.*" EPA Br., NBB v. EPA, Case Nos. 15-1072 and 15-1073, at 28 (D.C. Cir.).

B. The objections are of central relevance to EPA's decision.

Reconsideration is warranted here because EPA's decision to allow Small Refinery Generated RINs violates numerous provisions of the Clean Air Act and EPA's own regulations. While reports only reference HollyFrontier and Sinclair Oil, EPA's July 12th letter indicates that EPA is willing to retroactively grant exemptions after the compliance deadline. Because of EPA's lack of transparency and its determination that it has authority to allow obligated parties to generate RINs without any associated production in that year, the risk of additional RINs being reinstated goes well beyond these two companies.

a. EPA does not have authority to allow small refineries that have an exemption to generate RINs.

The RINs at issue here do not meet the requirements for a "credit" under the statute. The statute provides limited instances when a "credit" can be generated. As EPA has implemented the credit provision, the only potentially applicable scenario is the provision allowing for "the generation of credits by small refineries in accordance with paragraph (9)(C)." 42 U.S.C. § 7545(o)(5)(A)(iii). But, paragraph 211(o)(9)(C) applies only when a small refinery *waives* the exemption. These RINs are purportedly being generated based on a retroactive grant of an *extension*. There is no indication that Sinclair Oil or Holly Frontier provided EPA with the necessary waivers to be able to generate RINs. Indeed, indications are that they received additional extensions for later years. *See, e.g.*, Holly Frontier Corporation 10-K, Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, at 76 (Feb. 21, 2018) (noting EPA granted Holly Frontier retroactive small refinery exemptions for 2016 compliance year that saved the company about \$58 million in RIN compliance costs).

The statute also allows for generation of credits "by any person that refines, blends, or imports gasoline that contains a quantity of renewable fuel that is greater than the quantity required under paragraph (2)." 42 U.S.C. § 7545(o)(5)(A)(i). These credits are being generated with no associated quantity of renewable fuel, and, as further explained below, allow a *reduction* of the quantity of renewable fuel needed to meet the RVOs. As such, they cannot represent a "quantity of renewable fuel that is greater than the quantity required under paragraph (2)."

While these Small Refinery Generated RINs purport to replace RINs submitted for compliance in 2015, such RINs represent production in 2015, and as early as 2014 to the extent they were valid carryover RINs. It is difficult to determine whether the RINs at issue actually represent over-compliance with the 2015 required volumes. But, even if true, EPA cannot assert that these 2018 RINs represent an exceedance of the 2015 volume requirements, because such credits can only have a 12-month life.¹² *Id.* § 7545(o)(5)(C). This 12-month limit makes sense since the applicable volumes were intended to be "minimums" and, thus, there is no indication

¹² EPA set the 2015 RVO based on available RIN supply. While EPA EMTS data shows that reported RVOs are higher than EPA's estimate for 2015, *see* <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/annual-compliance-data-obligated-parties-and>, EPA has not released the total number of RINs generated by Holly Frontier and Sinclair Oil to be able to determine if the minimum volume requirements were exceeded for 2015.

that Congress sought to give parties credit in later years for over-compliance in earlier years.¹³ Any such credits would have long expired, and EPA's authorization to generate 2018 RINs to allow them to be used in 2018 circumvents this statutory limit.¹⁴

Finally, the statute allows for generation of credits "for biodiesel." 42 U.S.C. § 7545(o)(5)(A)(ii). These credits are not being generated based on actual production of biofuel and, thus, this provision cannot apply.

b. EPA's actions violate the waiver provisions of the Act.

Allowing for Small Refinery Generated RINs also violates the waiver provisions of the Clean Air Act. In allowing these retroactive grants of these extensions and, more important, allowing current-year RINs to be generated without representing actual supply, EPA is effectively further reducing the volume requirements for 2018 (and possibly for 2019 if EPA also allows these RINs to be used for compliance in the next year).

The Clean Air Act provides very limited authority for EPA to waive the minimum applicable volumes required. 42 U.S.C. § 7545(o)(7). EPA can waive the statutorily mandated volume requirements only if, after public notice and opportunity for comment, the Administrator finds that implementation of those requirements would "severely harm the economy or environment of a State, a region, or the United States" or that "there is an inadequate domestic supply." *Id.* EPA has not met the requirements to issue a further waiver of the 2018 RFS volumes. As an initial matter, again, EPA provided no public notice or opportunity to comment on the issuance of these RINs.¹⁵ Moreover, the retroactive grant of an extension of the small refinery exemption in 2015 cannot constitute severe economic harm to justify a waiver. The waiver provisions are not intended to address purported individual company harms. *See also* EPA, Renewable Fuel Standard Program Standards for 2018 and Biomass-Based Diesel Volume for 2019: Response to Comments ("2018 RFS Response to Comments") at 24 (2017) (stating that granting of small refinery exemption does not equate to economic harm under general waiver provision). Moreover, EPA has found that small refineries would not be negatively impacted by the RVOs it set. *See, e.g.*, 80 Fed. Reg. 77,420, 77,515 (Dec. 14, 2015).

c. The 2018 RINs at issue here are invalid under EPA's regulations.

EPA's actions here also violate its own regulations, and any party holding these Small Refinery Generated RINs are subject to enforcement. Under EPA's regulations, RINs are intended to represent production of biofuel. But, there is no biofuel production represented by these RINs. As such, the Small Refinery Generated RINs at issue here are invalid under EPA's regulations on several grounds.

¹³ Indeed, stakeholders have long raised concerns with the validity of EPA's regulations allowing for carryover RINs based on this limit on the life of a credit. Nonetheless, even under EPA's regulations, EPA only allows RINs to be used for compliance in the year they were generated (*i.e.*, the year the biofuel was produced) or the subsequent year. 2018 is several years removed from when the biofuel would have been produced.

¹⁴ Because EPA has not provided any information regarding the basis for its determination, the public cannot determine whether there are other appropriate remedies available to Sinclair Oil or Holly Frontier. Regardless, this potential problem provides evidence that EPA must reconsider its regulations allowing requests for extensions to occur "at any time."

¹⁵ The statute also required consultation with DOE and USDA.

First, these RINs are intended to represent RINs previously submitted for compliance and, thus, are a duplicate of a previously generated RIN. As such, they are invalid RINs under 40 C.F.R. § 80.1431(a)(1)(i).

Second, as noted above, these RINs would have expired, but for EPA allowing them to be reissued. A RIN is generated with *production* of renewable fuel. *See* 40 C.F.R. § 80.1425 (listing elements of a RIN based on, among other things, the volume of renewable fuel to which it is assigned, the registration number assigned to the producer or importer of the batch of renewable fuel, the registration number assigned to the facility at which the batch of renewable fuel was produced or imported; the type of renewable fuel the RIN represents, the amount of renewable fuel gallons). If EPA has now purported to grant the exemption, then the RIN is no longer being used for compliance in the calendar year in which it was generated or the following year, thus, it is “considered an expired RIN.” *Id.* § 80.1428(c). An expired RIN is considered an invalid RIN and cannot be used for compliance purposes. *Id.*

Third, since the RINs do not reflect biofuel produced in 2018, the RINs cannot represent renewable fuel as defined in § 80.1401. 40 C.F.R. § 80.1431(a)(1)(vi). Because there was no renewable fuel produced in 2018, it also cannot be that the RINs accurately reflect the proper temperature adjustment for the volume produced, a proper equivalence value, or the correct “D” code “for the associated volume of fuel. *Id.* § 80.1431(a)(1)(ii), (iv) and (vii).

Finally, because there is no regulation authorizing generation of RINs in this context, they were “otherwise improperly generated.” 40 C.F.R. § 80.1431(a)(1)(viii).

Thus, EPA has violated its own regulations in allowing these invalid RINs to be generated and it must put a lock on those RINs in the EMTS to prevent further transfer or use of such invalid RINs.

II. EPA’s Regulations Require Reconsideration and Revision.

In light of EPA’s recent actions regarding the small refinery exemptions, it is clear that EPA’s regulations do not “ensure” the minimum applicable volumes are being met. *See* 42 U.S.C. §§ 7545(o)(2)(A)(i), (o)(3)(B)(i). As such, they require reconsideration and revision.

A. Reconsideration and revision of 40 C.F.R. § 80.1441 is required because EPA’s application of the regulation has resulted in violations of the Clean Air Act.

Because the public could not predict EPA’s retroactive grants of “extensions” well beyond the time for compliance or EPA’s allowance of small refineries to reissue long-expired RINs, the public could not meaningfully assess how EPA’s regulations for handling the small refinery exemptions might actually operate. *See Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1532 (D.C. Cir. 1990) (noting ripeness depends on “whether consideration of the issue would benefit from a more concrete setting”) (citations omitted). Thus, it was impracticable for the public to comment on the efficacy and potential implications of the provisions in 40 C.F.R. § 80.1441. *See PPG Indus., Inc. v. Costle*, 659 F.2d 1239, 1249-50 (D.C. Cir. 1981) (finding EPA failed to comply with notice requirements under Administrative

Procedure Act where regulation could not be understood without subsequent guidance issued by EPA).

While initially EPA made adjustments to account for the small refinery exemptions, it subsequently determined that it could grant extensions after the RVOs were finalized and make no adjustments to the required volumes. The public questioned EPA's authority to do so, noting, while the statute provides for petitions at "any time," EPA's authority to reduce the volumes is limited, and it was still subject to its overarching obligation to "ensure" the required volumes are met. *See, e.g.,* EPA-HQ-OAR-2010-0133-0159 at 8-10. The public also noted to EPA that Congress did not intend for small refineries to enter in and out of the program, even in the face of subsequent economic distress, and, even if it did, there were alternative ways to handle the petitions that would not result in improper reductions of the volumes. *Id.* More important, the public had reason to believe that a small universe of small refineries remained eligible for additional extensions.

Indeed, in response to these comments, EPA indicated that it had adjusted the volume to account for additional small refinery exemption extensions granted. 77 Fed. Reg. at 1340. EPA further responded, however, that it continued to stand by its position that adjusting the RVOs would bring uncertainty, and that "Congress allowed for some imprecision to exist in the actual volumes of renewable fuel that are consumed as a result of the percentage standards that we set each November."¹⁶ *Id.* EPA did not, however, explain why it could not revise its regulations to set a time frame by when such requests must be granted. *See also* 2018 RFS Response to Comments at 216 (finding comments on process to be outside the scope).

EPA's actions also illustrate how EPA's current regulations allow small refineries to speculate and manipulate the RIN market. EPA has recently raised concerns regarding potential RIN market manipulation, and testimony before a House Subcommittee reiterated this potential concern, noting possible issues with the handling of the small refinery exemptions. Understanding the rules upfront provides more certainty and stability and removes this potential.

Further, the public could not have anticipated that EPA would act in a manner that is inconsistent with its own regulations. *See Nat'l Env'tl. Dev. Ass'n's Clean Air Project ("NEDA") v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014) ("It is 'axiomatic,' however, 'that an agency is bound by its own regulations. ... 'Although it is within the power of [an] agency to amend or repeal its own regulations, [an] agency is not free to ignore or violate its regulations while they remain in effect.'" (citations omitted)). The regulations require that the petitioning small refinery indicate when it can come into compliance. Instead, EPA has allowed refineries to wait until the end of the year to determine if they exceed the volume threshold, regardless of whether they can comply with the RFS program.¹⁷

EPA's determination that it should allow Sinclair Oil and Holly Frontier to issue 2018 RINs based on a retroactive grant of an exemption illustrates that EPA's regulations are inadequate. Reports of EPA's granting of exemptions and continued receipt of requests related to 2016 and 2017 compliance years raise the concern that EPA will determine it can continue to

¹⁶ We disagree with this notion, and refer EPA to the petition for reconsideration filed by the Renewable Fuels Association, et al., which explains why challenges to this determination were not ripe at the time and why EPA's expansion has altered the stakes for judicial review.

allow RINs to be generated when small refineries may have already submitted RINs for compliance. EPA's regulations must require the small refineries to meet the requirements of the regulations or submit these requests prior to the year in which the exemption is to apply.

Although the statute says the petition may be submitted at "any time," the statute also references "extensions." Moreover, EPA's own regulations require that the small refinery identify when it can come into compliance, indicating that the extension cannot end and then the small refinery ask for an extension. As described above, such a reading violates other provisions of the statute or allows EPA to circumvent these obligations. Rules of statutory construction require that the provisions be read in context. Indeed, EPA declined to find that the phrase "at any time" prevented it from requiring the extensions be requested prior to finalizing the standards, disagreeing "with commenters that stated that it is impractical to grant small refinery exemptions before the annual standards are established. 2018 RFS Response to Comments at 216. EPA simply stated that it believed its current approach remained appropriate.

Through its actions, EPA has fundamentally changed the regulatory program outlined in 40 C.F.R. § 80.1441, requiring notice and comment and significantly altering the stakes of judicial review. *See Sierra Club v. EPA*, 551 F.3d 1019, 1025 (D.C. Cir. 2008), *cert. denied*, 559 U.S. 991 (2010). It could not have been anticipated that EPA would not provide the public with an opportunity to comment on these changes, and it is not incumbent upon the public to remind EPA to follow the required procedures under the Act. *See, e.g., Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 521 (D.C. Cir. 1983) (finding EPA cannot "ignore the procedural requirements of §307(d)," even if the agency "gives a decent reason for doing so"). For all these reasons, the objections raised herein could not have been raised in the context of the 2010 RFS rulemaking.

B. EPA has Expressed the Need to Increase Transparency in the RIN market.

EPA has also acknowledged the need for greater transparency in the RIN market. Despite these acknowledgements, EPA has refused to provide details regarding its handling of the small refinery exemption. EPA has denied Freedom of Information Act requests, asking for basic information on the exemptions and has even failed to respond to requests for information from Congress.

But, EPA has already made a determination that basic information regarding the small refinery exemptions are not subject to confidential business information (CBI) and should be revealed to the public. EPA proposed to codify this determination in 2016,¹⁸ explaining that it

¹⁷ For example, CVR Energy indicated that it "no longer qualifie[d] as a small refinery" in 2016. *See CVR Energy Amicus Br.* at 12, *Am. For Clean Energy v. EPA*, No. 16-1005 (D.C. Cir.). EPA had not indicated that it would grant "new" exemptions to small refineries that are no longer eligible or have entered into the program and simply wait and see if they meet the 75,000 barrel per day threshold.

¹⁸ The proposed regulation would provide: "The following information related to petitions submitted under this section that have been accepted by EPA for evaluation is not entitled to confidential treatment under 40 CFR part 2, subpart B: (1) Petitioner's name. (2) The name and location of the facility for which relief is requested. (3) The general nature of the relief requested. (4) The time period for which relief is requested. (B) The following information related to EPA determinations on petitions submitted under this section is not entitled to confidential treatment under 40 CFR part 2, subpart B: (1) Petitioner's name. (2) The name and location of the facility for which relief was requested. (3) The general nature of the relief requested. (4) The time period for which relief was

sought to “clarify in the regulations that a clearly delineated set of basic information related to our decisions on small refinery/refiner exemption petitions is not entitled to treatment as CBI, since it is inherently part of the EPA’s decision and is not ‘obtained from a person’ outside of government.” 81 Fed. Reg. at 80,909. As EPA explained, this basic information is necessary to identify the nature and scope of work that the EPA has decided to undertake.” *Id.* at 80,910. EPA has provided no indication to the public whether or why it has changed this determination.

C. New information also calls into question whether EPA’s regulations adequately “ensure” the RVOs are being met with respect to the small refinery exemptions, requiring EPA to reconsider and revise its regulations.

EPA also must reconsider and revise its regulations based on new information that calls into question whether EPA is adequately ensuring the RVOs are being met, as required by the statute. Since EPA finalized the 2018 RVOs in December of 2017, there has been a steady stream of reports that EPA is exceeding its authority in its handling of the small refinery exemptions.

In its recent 2019 RFS proposal, EPA stated that approximately 1,460 million RINs were not required to be retired by small refineries that were granted hardship exemptions for 2017 and approximately 790 million RINs were not required to be retired by small refineries that were granted hardship exemptions for 2016, along with the RINs that Philadelphia Energy Solutions Refining and Marketing, LLC (“PESRM”) was not required to retire as part of its bankruptcy settlement agreement. These are not de minimis amounts. And, because EPA had not accounted for small refinery exemptions in setting the RVOs, the actual volumes required fell below the 2016 and 2017 minimum applicable volumes. This was not the case in other years of the program.

Although EPA has indicated it may grant extensions after the RVOs are finalized, EPA provided no indication that it would grant requests for “extensions” well after the compliance deadline has passed. It is unclear how a small refinery can show disproportionate economic hardship due to the RFS when it has already complied with the program. On June 22, 2018, EPA updated its EMTS data based on data through June 10, 2018. Based on EPA’s updated information, the overall RVO for 2017 was reduced by 258 million RINs compared to data from April. The overall advanced biofuel volume for 2017 was reduced by 57 million RINs compared to data from April. The biomass-based diesel RVO for 2017 was reduced by another 40 million RINs compared to data from May. Since the compliance deadline has passed, this illustrates that EPA continues to grant extensions retroactively. *See* EMTS Annual Compliance Data, as of June 10, 2018; EMTS Annual Compliance Data, as of April 17, 2018.¹⁹ This presumably allows

requested. (5) The extent to which EPA either granted or denied the requested relief. (C) The EPA will disclose the information specified in paragraphs (e)(2)(iv)(A) and (B) of this section on its Web site, or will otherwise make it available to interested parties, notwithstanding any claims that the information is entitled to confidential treatment under 40 CFR part 2, subpart B.”

¹⁹ The compliance deadline for 2017 was March 31, 2018. There is also evidence that EPA has granted exemptions for 2016 after the compliance deadline, which was March 31, 2017. Comparing EMTS data from June 10, 2018 to data from June 9, 2017 shows a reduction in the reported RVOs by 70 million RINs for the biomass-based diesel volume, by 87 million RINs for advanced biofuels, and by 439 million RINs. *See* EMTS Annual Compliance Data, as of June 10, 2018; EMTS Annual Compliance Data, as of April 17, 2018. This resulted in the

those parties who submitted RINs for compliance or who held onto RINs hoping for the exemption to flood the market with those RINs and claim an additional *profit*.

EPA is required to consult with DOE on any petitions. DOE has scored applications on a two-part test that considers whether compliance would lead to disproportionate impact or threaten a refinery's viability. On June 26, 2018, it was reported that EPA has ignored DOE's recommendations.²⁰ The report, based on two sources, indicated that "EPA has consistently granted full waivers in cases where the energy department recommended only partial exemptions, and, at least once, granted a full approval when the energy department advised an outright rejection." This is in stark contrast to the prior administration, "which had often either adopted energy department recommendations or, when it didn't, ruled against exempting oil refiners."²¹ The EPA's increase in these "extensions" has sent the price of RINs to five-year lows.

III. EPA Must "Lock" the Invalid RINs Generated by HollyFrontier and Sinclair Oil, and Should Stay any Further Action on the Small Refinery Exemptions Pending Reconsideration.

Petitioner has demonstrated that reconsideration is warranted in this case. To mitigate against the harms caused by EPA's failure to comply with the notice and comment requirements of the Clean Air Act and by the approval of generation of invalid RINs, Petitioner requests that EPA immediately "lock" the 2018 RINs generated by Holly Frontier and Sinclair Oil so that they cannot be transferred or used for compliance. Because of the significant questions raised by EPA's current handling of the small refinery exemption, Petitioner also requests that EPA stay any further action under 40 C.F.R. § 80.1441 during the reconsideration process pursuant to 42 U.S.C. § 7607(d)(7)(B) or the rulemaking process to revise its regulations.

An administrative stay is appropriate and necessary while the Agency considers and addresses the numerous flaws in its handling of the small refinery exemptions. Under 42 U.S.C. § 7607(d), EPA may grant a 90-day stay pending reconsideration, and we respectfully request that it do so. We also believe justice also requires a stay under 5 U.S.C. § 705. Although we are requesting the stay, we believe the ongoing harms caused by EPA's actions and the clear violations of the statute require the stay be granted immediately. As such, this request should not be deemed as restricting the ability to assert seeking a stay with the agency would be impracticable. Indeed, numerous request have been submitted to EPA asking it to stop issuing invalid small refinery exemptions, yet reports continue that EPA is accepting and even granting such requests.²²

minimum volume requirements not being met for 2016. It is possible that some of this reduction was a result of the Philadelphia Energy Solutions bankruptcy.

²⁰ Jarrett Renshaw and Chris Prentice, *Trump's EPA ignored Energy Department calls to limit biofuel waivers*, Reuters, June 26, 2018, <https://www.reuters.com/article/us-usa-epa-biofuels-exclusive/exclusive-trumps-epa-ignored-energy-department-calls-to-limit-biofuel-waivers-idUSKBN1JM17T>.

²¹ EPA has denied public records requests seeking information on these extensions.

²² This stands in contrast to the grants of administrative stays this Administration has granted at the request of the petroleum industry. 82 Fed. Reg. 25,730 (June 2, 2017); 82 Fed. Reg. 27,133 (June 14, 2017).

A. EPA has violated several provisions of the Clean Air Act and, thus, Petitioner is likely to succeed on the merits.

As described above, EPA's actions are in clear violation of the Clean Air Act and its own regulations. These violations include:

- 1) Failing to provide notice and comment on the generation of 2018 RINs by obligated parties that are not producing biofuel;
- 2) Exceeding its authority under the Clean Air Act to allow generation of RINs by small refineries that have received an extension of the exemption under the Act;
- 3) Circumventing the limitation on the life of credits under the RFS program;
- 4) Allowing generation of 2018 RINs for which no "renewable fuel" was produced in 2018;
- 5) Allowing generation of invalid 2018 RINs that could be transferred or used for compliance in violation of EPA's regulations;
- 6) Improperly reducing the 2016, 2017 and 2018 volumes by retroactively granting small refinery exemptions, even after the compliance deadlines, and allowing generation of 2018 RINs; and
- 7) Failing to promulgate regulations that "ensure" the minimum required volumes are being met.

EPA's actions have undermined the purpose of the RFS program to provide a certain market for the promotion of biofuels, particularly advanced biofuels. The statute is clear, and, in any event, there is no reasonable interpretation of the statute that allows EPA to take these actions.

B. An administrative stay will prevent irreparable harm and is in the public interest.

Without an administrative stay, EPA's actions will continue to have a negative impact on the market and on biofuel producers, including those that are members of the Petitioner. They also will undermine the RFS program, which Congress found to be in the national interest.

The purpose of the RFS program was to incentivize investment in biofuel production. Biofuel producers have done just that. The volatility in the market caused by EPA's actions have caused producers to lose their investments. Those that own RINs have lost the value of those RINs, which, in turn, restrict their ability to continue to invest and grow the program.

By expanding the small refinery exemption, failing to adjust for the lost volumes, and allowing RINs to be generated without a corresponding production of biofuels, EPA is reducing the displacement of petroleum-based fuels with renewable fuels. As Congress has recognized, renewable fuels, particularly advanced biofuels, provides environmental benefits. EPA's actions, thus, allow for increases in greenhouse gas emissions, air toxics, and other pollutants that are harmful to the public health.

RINs have also provided rural economic benefits, and the reduced demand has had a negative impact on farmers. It also can affect the benefits to consumers, where EPA has consistently found that the RFS program has contributed to lower prices at the pump. This is particularly concerning today given the recent increases in fuel prices.

It is also in the public benefit that EPA follows good governance. The closed door actions by EPA undermine the regulatory process and the public's faith in the government.

C. An administrative stay will not cause harm to other parties.

The requested stay will not cause harm to other parties. Certain obligated parties and small refineries appear to be using the exemption to game the system and obtain profits, rather than take actions to come into compliance.

In *Americans for Clean Energy v. EPA*, the D.C. Circuit rejected a request for a stay from small refineries seeking to avoid their RFS obligations. Indeed, under EPA's regulations, those parties that are truly small refineries facing disproportionate economic harms should already have their extensions in place.

IV. SUMMARY AND CONCLUSION

For the foregoing reasons, we request that EPA reconsider its decision to allow obligated parties to generate RINs for prior years as a result of a change in status of the small refinery exemption. We further ask EPA to reconsider its process for granting these exemptions and its determination that it can and should continue to grant those exemptions after the volumes are set and after compliance. EPA has authority to initiate a rulemaking on these issues and should stay any further action regarding these "new" exemptions or reinstatement of RINs until it has provided the public with a clear and open process for doing so.

Respectfully submitted,

/s/ Jerome C. Muys, Jr. _____

Jerome C. Muys, Jr.
Sullivan & Worcester LLP
1666 K Street, NW
Washington, DC 20006
T 202 370 3920
F 202 293 2275
jmuys@sandw.com

*Counsel for Producers of Renewables United for
Integrity Truth and Transparency*

Message

From: Parsons, Nick [Parsons.Nick@epa.gov]
Sent: 8/22/2018 6:12:22 PM
To: Nelson, Karen [nelson.karen@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]; Michaels, Lauren [Michaels.Lauren@epa.gov]; McKenna, Chris [McKenna.Chris@epa.gov]; Boylan, Thomas [boylan.thomas@epa.gov]; Piotrowski, Greg [piotrowski.greg@epa.gov]; Sutton, Tia [sutton.tia@epa.gov]
Subject: RE: Draft **Ex. 4 CBI** Letter Denying new vintage RINs

I finally reviewed this letter and made edits throughout on SharePoint. One aspect we need to resolve is when and how we refer to **Ex. 4 CBI**. I tried making that distinction in my edits (e.g., the exemption is for **Ex. 4 CBI** but it's **Ex. 4 CBI** that actually retired the RINs, etc.), but I'm sure the lawyers will want to review for accuracy/clarity/consistency.

- Nick

From: Nelson, Karen
Sent: Monday, August 13, 2018 9:32 AM
To: Cohen, Janet <cohen.janet@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; McKenna, Chris <McKenna.Chris@epa.gov>; Boylan, Thomas <boylan.thomas@epa.gov>; Piotrowski, Greg <piotrowski.greg@epa.gov>; Sutton, Tia <sutton.tia@epa.gov>
Subject: Draft HollyFrontier Letter Denying new vintage RINs

Hi Team,

Here is the first draft of the letter telling **Ex. 4 CBI** that we will not issue current year vintage RINs in exchange for the 2015 RINs they retired for compliance, prior to petitioning and receiving a SRE.

I haven't included Sue on this letter because I thought it might be better to wait until the team reviews it first, and to send her then the second draft. This version is on Share Point site, in the 2016 **Ex. 4 CBI** petition folder (since that's what it's responding to).

Thank you for your time.

Sincerely,
 Karen Nelson
 Compliance Division
 (734) 214-4657

Message

From: Nelson, Karen [nelson.karen@epa.gov]
Sent: 8/3/2020 6:47:57 PM
To: McKenna, Chris [McKenna.Chris@epa.gov]; Parsons, Nick [Parsons.Nick@epa.gov]; Michaels, Lauren [Michaels.Lauren@epa.gov]; Spencer, Mark [spencer.mark@epa.gov]; Miller, Meredith [Miller.Meredith@epa.gov]; Caballero, Kathryn [Caballero.Kathryn@epa.gov]
CC: Machiele, Paul [machiele.paul@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]; Stahle, Susan [Stahle.Susan@epa.gov]
Subject: FW: Gap SRE Petition Findings
Attachments: DOE RFS SRE Findings 2011-2012 [Ex. 4 CBI] pdf; DOE RFS SRE Findings 2011-2015 [Ex. 4 CBI] pdf; DOE RFS SRE Findings 2011-2016 [Ex. 4 CBI] pdf; DOE RFS SRE Findings 2013-2016 [Ex. 4 CBI] pdf; DOE RFS SRE findings 2013-2016 [Ex. 4 CBI] pdf; DOE RFS SRE Findings 2013-2016 [Ex. 4 CBI] pdf; DOE RFS SRE Findings for 2011-2015 [Ex. 4 CBI] pdf; DOE RFS SRE Findings for 2011-2016 [Ex. 4 CBI] pdf; DOE RFS SRE Findings for 2013-2014 [Ex. 4 CBI] pdf; DOE RFS SRE Findings for 2013-2015 [Ex. 4 CBI] pdf; DOE RFS SRE Findings for [Ex. 4 CBI] 2014-2016.pdf; DOE SRE Findings EPA Memo [Ex. 4 CBI] 2011-2016.pdf; DOE SRE Findings for 2016 [Ex. 4 CBI] [Ex. 4 CBI] pdf; DOE SRE Findings for 2018 [Ex. 4 CBI] pdf; DOE SRE Findings for [Ex. 4 CBI] 2011-2015.pdf

Hey Team,

Here are the DOE scores and recommendations for the gap-filling petitions that they were able to score. Byron wants to talk more about these at tomorrow's team meeting. I'll put together a brief agenda for that and send it around later. If you have topics for discussion tomorrow please let me know.

Thanks!
 -Karen

-----Original Message-----

From: Bunker, Byron <bunker.byron@epa.gov>
Sent: Monday, August 3, 2020 2:15 PM
To: Nelson, Karen <nelson.karen@epa.gov>
Cc: Stahle, Susan <Stahle.Susan@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>
Subject: FW: Gap SRE Petition Findings

Hi Karen,

Attached please find DOE's recommendations for 57 hardship petitions from 15 small refineries. Can you please move these to the appropriate location on the team sharepoint site and share with the team members? I would like to discuss follow up on these during our team meeting tomorrow.

Thanks,

Byron

Byron Bunker
 Director Compliance Division
 Office of Transportation and Air Quality Environmental Protection Agency
 2000 Traverwood Drive
 Ann Arbor, MI 48105
 Bunker.Byron@epa.gov
 Phone: (734) 214-4155
 [Ex. 6 Personal Privacy (PP)]

-----Original Message-----

From: Dunham, Sarah <Dunham.Sarah@epa.gov>
Sent: Thursday, July 30, 2020 11:08 AM
To: Bunker, Byron <bunker.byron@epa.gov>
Subject: FW: Gap SRE Petition Findings

Per our discussion

-----Original Message-----

From: Dominguez, Alexander <dominguez.alexander@epa.gov>
Sent: Thursday, July 30, 2020 10:56 AM
To: Dunham, Sarah <Dunham.Sarah@epa.gov>

Cc: Idsal, Anne <idsal.anne@epa.gov>
Subject: FW: Gap SRE Petition Findings

Sarah,

As discussed, please find attached initial findings from DOE. I will reach out to Delaney now to schedule time on Monday. Anything else please let me know.

Thank you,

Alex

Alex Dominguez
Senior Policy Advisor | Office of Air and Radiation U.S. Environmental Protection Agency
Desk: 202.564.3164

-----Original Message-----

From: Powell, John <john.powell@hq.doe.gov>
Sent: Tuesday, July 28, 2020 5:25 PM
To: Idsal, Anne <idsal.anne@epa.gov>
Cc: Dominguez, Alexander <dominguez.alexander@epa.gov>
Subject: Gap SRE Petition Findings

Anne/Alex,

Attached are the DOE findings for the 57 Gap SRE petitions received from EPA.

John Powell
Senior Advisor to the Secretary
U.S. Department of Energy
1000 Independence Ave., SW
Washington, DC 20585
202-586-1814 Mobile: Ex. 6 Personal Privacy (PP)
John.powell@hq.doe.gov
John.powell@hq.doe.sgov.gov

Message

From: McKenna, Chris [McKenna.Chris@epa.gov]
Sent: 7/12/2018 12:39:48 PM
To: [Ex. 4 CBI]; Kim, Jung [Kim.Jung@epa.gov]
CC: Larson, Ben [Larson.Ben@epa.gov]; Weihrauch, John [Weihrauch.John@epa.gov]; [Ex. 4 CBI]
[Ex. 4 CBI] Cohen, Janet [cohen.janet@epa.gov]
Subject: RE: [Ex. 4 CBI] 2017 RFS exemption - restoration of 2017 RINs

[Ex. 4 CBI]

I understand you would have managed things differently if your petition had been submitted and processed before the 2017 compliance deadline (3/31/18). However, if you used 2016 RINs to meet 20% of your 2017 aggregate RVO, then those 2016 RINs that were apportioned to [Ex. 4 CBI] for 2017 compliance are expired and we will not be reinstating them. We've had this same issue with other late petitions, and that's how they were treated as well.

Thanks for checking,
Chris

-----Original Message-----

From: [Ex. 4 CBI]
Sent: Wednesday, July 11, 2018 7:09 PM
To: Kim, Jung <Kim.Jung@epa.gov>; McKenna, Chris <McKenna.Chris@epa.gov>
Cc: Larson, Ben <Larson.Ben@epa.gov>; Weihrauch, John <Weihrauch.John@epa.gov>; [Ex. 4 CBI]
[Ex. 4 CBI]
Subject: RE: [Ex. 4 CBI] 2017 RFS exemption - restoration of 2017 RINs

Jung/Chris,

Ex. 4 CBI

-----Original Message-----

From: Kim, Jung [mailto:Kim.Jung@epa.gov]
Sent: Monday, July 09, 2018 6:16 AM
To: McKenna, Chris <McKenna.Chris@epa.gov>; [Ex. 4 CBI]
Cc: Larson, Ben <Larson.Ben@epa.gov>; Weihrauch, John <Weihrauch.John@epa.gov>
Subject: [**EXTERNAL**] RE: [Ex. 4 CBI] 2017 RFS exemption - restoration of 2017 RINs

Good morning [Ex. 4 CBI]

Could you please provide the following information for the 2017 RINs that were used by [Ex. 4 CBI] for compliance at [Ex. 4 CBI] Refinery (compliance year 2017) ?

- Company ID
- EMTS Transaction ID
- RIN Quantity
- Fuel (D Code)
- RIN Year

Also, please update and resubmit the RFS annual compliance report (RFS0303) to reflect this exemption.

Thanks,

Jung

-----Original Message-----

From: McKenna, Chris

Sent: Monday, July 09, 2018 8:59 AM

To: [Ex. 4 CBI] Kim, Jung <Kim.Jung@epa.gov>

Cc: Larson, Ben <Larson.Ben@epa.gov>; Weihrauch, John <Weihrauch.John@epa.gov>

Subject: [Ex. 4 CBI] 2017 RFS exemption - restoration of 2017 RINS

[Ex. 4 CBI] - Jung Kim can help you with the restoration of your 2017 RINS, I'm cc'ing him on this response.

Jung - would you please work with [Ex. 4 CBI] to restore any 2017 RINS that were used by [Ex. 4 CBI] for compliance at their [Ex. 4 CBI] refinery in 2017. The [Ex. 4 CBI] refinery was granted a 2017 RFS small refinery exemption on 5/24/18, after [Ex. 4 CBI] had retired all RINS needed for compliance in 2017.

Please let me know any questions.

Thanks very much,
Chris

-----Original Message-----

From: [Ex. 4 CBI]

Sent: Friday, July 06, 2018 2:52 PM

To: McKenna, Chris <McKenna.Chris@epa.gov>

Subject: RE: EPA decision on [Ex. 4 CBI] 2017 RFS hardship petition (CONTAINS CONFIDENTIAL BUSINESS INFORMATION)

Hi Chris,

Can you let me know whom I speak to about how to actually go about restoring RINS to our account for this. I'd understood from our compliance consultant that another department there would be issuing instructions, but I haven't seen anything yet. I'd also like to discuss what vintage RINS will be restored. Given that 2016 RINS have expired, my assumption was that 2017 RINS would be restored, though we've heard rumors of 2018 RINS being generated.

Sorry for the long delay on following up on this.

Thanks,

Ex. 4 CBI

-----Original Message-----

From: McKenna, Chris [mailto:McKenna.Chris@epa.gov]

Sent: Thursday, May 24, 2018 5:20 AM

To: [Ex. 4 CBI]

Cc: Cohen, Janet <cohen.janet@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Grundler, Christopher <grundler.christopher@epa.gov>; Hengst, Benjamin <Hengst.Benjamin@epa.gov>

Subject: [**EXTERNAL**] EPA decision on [Ex. 4 CBI] 2017 RFS hardship petition (CONTAINS CONFIDENTIAL BUSINESS INFORMATION)

[Ex. 4 CBI]

Attached is a scanned copy of EPA's response to [Ex. 4 CBI] 2017 RFS hardship petition for the [Ex. 4 CBI] refinery. A paper copy will also be mailed to the refinery manager [Ex. 4 CBI].

Please let me know any questions,
Chris

Chris McKenna
Staff Engineer
US EPA, Office of Transportation and Air Quality
1200 Pennsylvania Avenue, NW
Washington, DC 20460
202-343-9037

Message

From: Nelson, Karen [nelson.karen@epa.gov]
Sent: 8/13/2018 3:53:09 PM
To: Cohen, Janet [cohen.janet@epa.gov]; Michaels, Lauren [Michaels.Lauren@epa.gov]; Parsons, Nick [Parsons.Nick@epa.gov]; McKenna, Chris [McKenna.Chris@epa.gov]; Boylan, Thomas [boylan.thomas@epa.gov]; Piotrowski, Greg [piotrowski.greg@epa.gov]; Sutton, Tia [sutton.tia@epa.gov]
Subject: RE: Draft **Ex. 4 CBI** Letter Declining Review of Old Petitions
Attachments: DRAFT_Letter Declining Petition Review-Mootness_8.10.18.docx

Hi Team,

Ex. 5 Deliberative Process (DP)

Again, I didn't include Sue on this email because I thought it would be better for the team to review it first and then send it along to Sue later.

This letter draft is also on Share Point. I put it in the **Ex. 4 CBI** petition folder.

Thanks!
-Karen

Message

From: Nelson, Karen [nelson.karen@epa.gov]
Sent: 8/13/2018 1:32:18 PM
To: Cohen, Janet [cohen.janet@epa.gov]; Michaels, Lauren [Michaels.Lauren@epa.gov]; Parsons, Nick [Parsons.Nick@epa.gov]; McKenna, Chris [McKenna.Chris@epa.gov]; Boylan, Thomas [boylan.thomas@epa.gov]; Piotrowski, Greg [piotrowski.greg@epa.gov]; Sutton, Tia [sutton.tia@epa.gov]
Subject: Draft **Ex. 4 CBI** Letter Denying new vintage RINs
Attachments: DRAFT_Response Denying New Vintage RINs for 2016 SRE_8.1.18.docx

Hi Team,

Here is the first draft of the letter telling **Ex. 4 CBI** that we will not issue current year vintage RINs in exchange for the 2015 RINs they retired for compliance, prior to petitioning and receiving a SRE.

I haven't included Sue on this letter because I thought it might be better to wait until the team reviews it first, and to send her then the second draft. This version is on Share Point site, in the 2016 **Ex. 4 CBI** petition folder (since that's what it's responding to).

Thank you for your time.

Sincerely,
Karen Nelson
Compliance Division
(734) 214-4657

Message

From: Machiele, Paul [machiele.paul@epa.gov]
Sent: 7/14/2020 2:29:09 PM
To: Cohen, Janet [cohen.janet@epa.gov]
Subject: FW: New Control: AL-20-000-5875
Attachments: AL-20-000-5875 Control slip.pdf; AL-20-000-5875 Correspondence.pdf

Here it is.

Paul

From: Brody, Margaret <brody.margaret@epa.gov>
Sent: Monday, July 13, 2020 12:23 PM
To: Burkholder, Dallas <burkholder.dallas@epa.gov>
Cc: Machiele, Paul <machiele.paul@epa.gov>
Subject: New Control: AL-20-000-5875

Hi Dallas,
We received a new control today – AL-20-000-5875.
Deadline to Paul is 7-17-2020.

Thank you,

Peggy

Peggy Brody, APR
Communications Coordinator
Assessment and Standards Division
Supporting the US EPA through a Cooperative Agreement with SSAI
U. S. Environmental Protection Agency
2000 Traverwood Drive
Ann Arbor, MI 48105

PH: 734-214-4613
brody.margaret@epa.gov

Congress of the United States
Washington, D.C. 20515

July 2, 2020

President Donald J. Trump
The White House
1600 Pennsylvania Ave.
Washington, D.C. 20500

Dear President Trump,

On June 18, 2020 the Environmental Protection Agency (EPA) reported 52 new Renewable Fuel Standard (RFS) waiver petitions for past compliance years through its RFS Small Refinery Exemption Dashboard. These new waiver requests date from 2011 through 2018, long after RFS compliance for those years has closed. We are concerned that if retroactive waivers are granted by the EPA, they could be used as a new pathway to further undermine the RFS.

We believe that these “gap year” petitions are ultimately an effort to evade and undermine the January 2020 Tenth Circuit Court ruling in *Renewable Fuels Association v EPA*¹, where the Court held that small refinery exemptions (SRE) could only be granted to refineries that received consecutive annual exemptions. As you know, the Court determined EPA could only grant “extensions” of existing waivers and could not “extend” waivers where they previously did not exist. Moreover, the Court found that any waiver must be solely tied to demonstrated harm caused specifically by the RFS, not any other factors.

We are concerned that these “gap year” waivers are an attempt to circumvent the Court’s ruling at the expense of the biofuel producers, farmers, and rural communities we represent. As you know, the RFS provides hundreds of thousands of jobs across rural America, supports corn and soybean markets, and lowers fuel prices. These “gap year” SRE requests jeopardize the integrity of the RFS and, if granted, will devastate our rural economies.

We respectfully request that you ensure the EPA immediately deny these 52 “gap year” refinery exemptions as they are inconsistent with the Tenth Circuit Court ruling, and Congressional intent of the RFS. Petitioning for retroactive exemptions undermines the Court’s decision, and the legal obligation that petitions be filed “in a timely manner.” Considering this ruling, there is no reasonable scenario in which an existing refinery can claim it is entitled to an exemption that it did not previously seek or receive.

Since 2016, more than 4 billion gallons of biofuels have been wiped from the marketplace as a result of the number of SREs granted by the EPA. Granting these 52 new “gap year” SREs would equate to a loss of an additional 2 billion gallons of biofuel demand. Setting this dangerous precedent would ultimately devastate the rural economy. Additionally, the EPA has 80 pending SREs in total which must be considered in a manner that is consistent with the Tenth Circuit Court’s decision.


¹ 948 F. 3d 1206 (10th Cir. 2020)

The RFS has been a tremendous success, providing a critical value-added market for our farmers, lowering the price of fuel for consumers, and improving air quality across the nation. The EPA's repeated efforts to undermine the RFS with waivers, SREs, and tepid annual volume requirements continue to undermine the future potential of our local farmers and biofuels producers.


Please direct the EPA to uphold the Tenth Circuit Court's ruling in light of its nationwide applicability and quickly deny these "gap year" waiver requests as quickly as possible in order to uphold the RFS and provide certainty for the biofuels economy.

Thank you for your consideration of this request and your continued commitment to serving rural America.


Sincerely,



Rodney Davis
Member of Congress



Collin C. Peterson
Member of Congress




Dave Loebsack
Member of Congress




Roger Marshall, M.D.
Member of Congress



Jim Hagedorn
Member of Congress



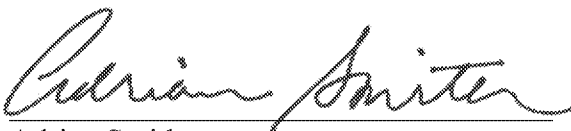
Abby Finkenauer
Member of Congress



Dusty Johnson
Member of Congress



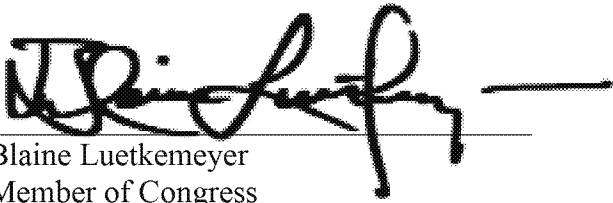
Darin LaHood
Member of Congress



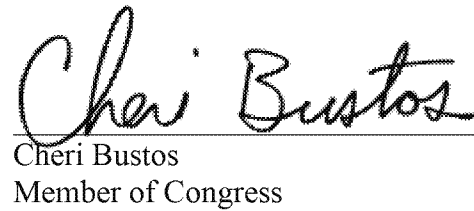
Adrian Smith
Member of Congress



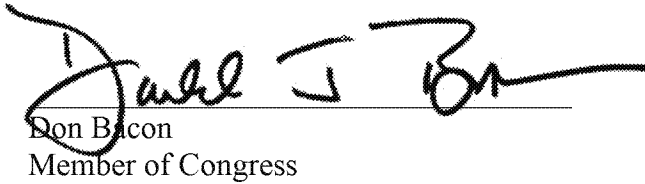
Cindy Axne
Member of Congress



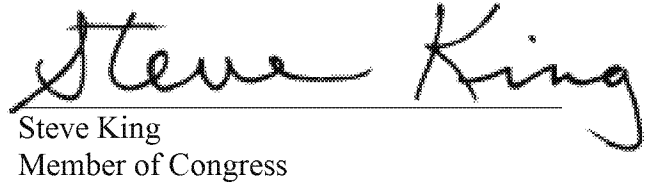
Blaine Luetkemeyer
Member of Congress



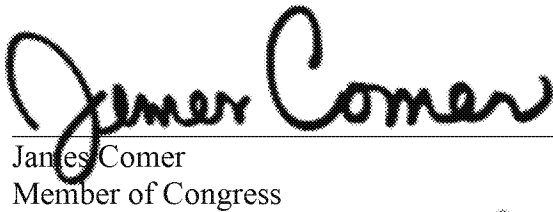
Cheri Bustos
Member of Congress



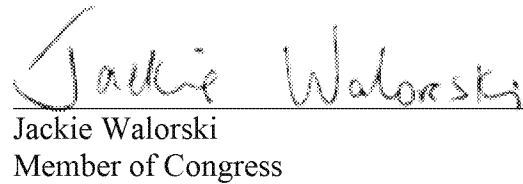
Don Bacon
Member of Congress



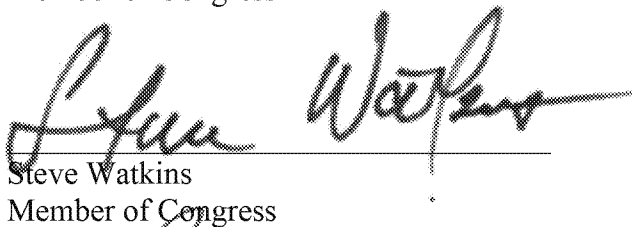
Steve King
Member of Congress



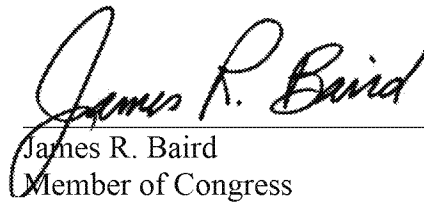
James Comer
Member of Congress



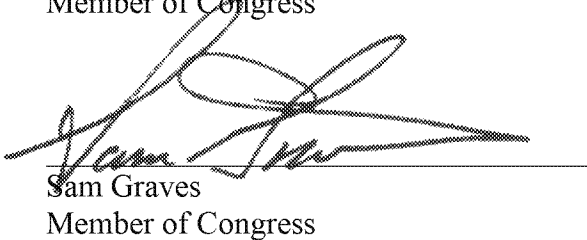
Jackie Walorski
Member of Congress



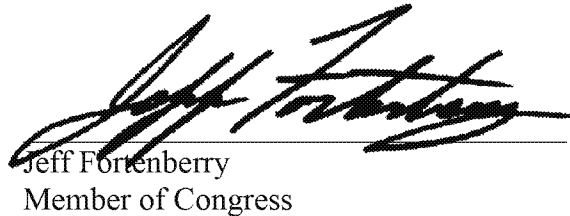
Steve Watkins
Member of Congress



James R. Baird
Member of Congress



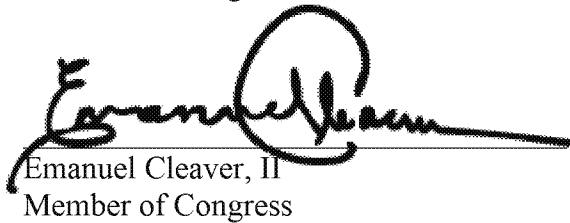
Sam Graves
Member of Congress



Jeff Fortenberry
Member of Congress



Mike Bost
Member of Congress



Emanuel Cleaver, II
Member of Congress



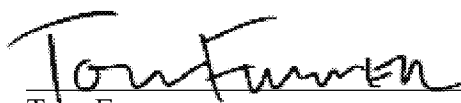
Vicky Hartzler
Member of Congress



Rick Crawford
Member of Congress



Ron Kind
Member of Congress



Tom Emmer
Member of Congress



Adam Kinzinger
Member of Congress



Ron Estes
Member of Congress



Mike Kelly
Member of Congress



Angie Craig
Member of Congress



Lauren Underwood
Member of Congress

/S/ David N. Cicilline

David N. Cicilline
Member of Congress

Message

From: Stahle, Susan [Stahle.Susan@epa.gov]
Sent: 6/5/2018 7:42:18 PM
To: Cohen, Janet [cohen.janet@epa.gov]
Subject: Briefing slides
Attachments: OGC small refinery discussion - 6-4 am.pptx

Hi –

As you requested, here are the briefing slides we used yesterday to brief our General Counsel on the small refinery matters.

Susan Stahle
Attorney-Advisor
Air and Radiation Law Office
Office of General Counsel
U.S. Environmental Protection Agency
202-564-1272 (ph)
202-564-5603 (fax)
stahle.susan@epa.gov

Message

From: Stahle, Susan [Stahle.Susan@epa.gov]
Sent: 5/15/2018 2:55:38 PM
To: Nelson, Karen [nelson.karen@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]; Machiele, Paul [machiele.paul@epa.gov]; McKenna, Chris [McKenna.Chris@epa.gov]; Michaels, Lauren [Michaels.Lauren@epa.gov]; Parsons, Nick [Parsons.Nick@epa.gov]; Piotrowski, Greg [piotrowski.greg@epa.gov]; Sutton, Tia [sutton.tia@epa.gov]; Weihrauch, John [Weihrauch.John@epa.gov]
CC: Orlin, David [Orlin.David@epa.gov]
Subject: Small refinery briefing for General Counsel - welcome your quality control type thoughts
Attachments: OGC small refinery discussion - draft - 051518.pptx

Hi –

Here is the draft version of the briefing we have put together to use to brief our General Counsel on the small refinery program. He requested this briefing after the ABFA lawsuit was filed. We welcome any big picture thoughts (and corrections if you see any errors). Not necessarily looking for detailed edits/comments as we have already sent this forward for management review.

Thanks,

Susan Stahle
Attorney-Advisor
Air and Radiation Law Office
Office of General Counsel
U.S. Environmental Protection Agency
202-564-1272 (ph)
202-564-5603 (fax)
stahle.susan@epa.gov

Message

From: Sutton, Tia [sutton.tia@epa.gov]
Sent: 4/18/2018 1:46:09 PM
To: OTAQ Materials [OTAQMaterials@epa.gov]
CC: Anderson, Robert [Anderson.Robert@epa.gov]; Borgert, Kyle [borgert.kyle@epa.gov]; Bunker, Byron [bunker.byron@epa.gov]; Burch, Julia [Burch.Julia@epa.gov]; Burkholder, Dallas [burkholder.dallas@epa.gov]; Charmley, William [charmley.william@epa.gov]; Cohen, Janet [cohen.janet@epa.gov]; Dubois, Roland [Dubois.Roland@epa.gov]; Korotney, David [korotney.david@epa.gov]; Larson, Ben [Larson.Ben@epa.gov]; Le, Madison [Le.Madison@epa.gov]; Levy, Aaron [Levy.Aaron@epa.gov]; Li, Ryland (Shengzhi) [Li.Ryland@epa.gov]; Lie, Sharyn [Lie.Sharyn@epa.gov]; Machiele, Paul [machiele.paul@epa.gov]; Manners, Mary [manners.mary@epa.gov]; Master, Barbora [Master.Barbora@epa.gov]; Michaels, Lauren [Michaels.Lauren@epa.gov]; Nelson, Karen [nelson.karen@epa.gov]; Orlin, David [Orlin.David@epa.gov]; Parsons, Nick [Parsons.Nick@epa.gov]; Shelby, Michael [Shelby.Michael@epa.gov]; Simon, Karl [Simon.Karl@epa.gov]; Sobel, Aaron [Sobel.Aaron@epa.gov]; Stahle, Susan [Stahle.Susan@epa.gov]; Weihrauch, John [Weihrauch.John@epa.gov]
Subject: Last handout for this morning's 10am fuels weekly with Chris
Attachments: 4_18_18 draft bw small refinery update.docx

Sorry!! This is the last item for this morning's 10am. I am making copies for DC, Janet is making the copies for Ann Arbor. Thanks!

From: Sutton, Tia
Sent: Wednesday, April 18, 2018 9:38 AM
To: OTAQ Materials <OTAQMaterials@epa.gov>
Cc: Anderson, Robert <Anderson.Robert@epa.gov>; Borgert, Kyle <borgert.kyle@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Burch, Julia <Burch.Julia@epa.gov>; Burkholder, Dallas <burkholder.dallas@epa.gov>; Charmley, William <charmley.william@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Dubois, Roland <Dubois.Roland@epa.gov>; Korotney, David <korotney.david@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>; Le, Madison <Le.Madison@epa.gov>; Levy, Aaron <Levy.Aaron@epa.gov>; Li, Ryland (Shengzhi) <Li.Ryland@epa.gov>; Lie, Sharyn <Lie.Sharyn@epa.gov>; Machiele, Paul <machiele.paul@epa.gov>; Manners, Mary <manners.mary@epa.gov>; Master, Barbora <Master.Barbora@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Shelby, Michael <Shelby.Michael@epa.gov>; Simon, Karl <Simon.Karl@epa.gov>; Sobel, Aaron <Sobel.Aaron@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>; Weihrauch, John <Weihrauch.John@epa.gov>
Subject: Additional handout for this morning's 10am fuels weekly with Chris
Importance: High

Apologies for the late hit here, but one additional handout attached here for the 10am Fuels Weekly. I will make copies here in DC.

From: Hengst, Benjamin
Sent: Tuesday, April 17, 2018 9:26 PM
To: OTAQ Materials <OTAQMaterials@epa.gov>
Cc: Anderson, Robert <Anderson.Robert@epa.gov>; Borgert, Kyle <borgert.kyle@epa.gov>; Bunker, Byron <bunker.byron@epa.gov>; Burch, Julia <Burch.Julia@epa.gov>; Burkholder, Dallas <burkholder.dallas@epa.gov>; Charmley, William <charmley.william@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Dubois, Roland <Dubois.Roland@epa.gov>; Korotney, David <korotney.david@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>; Le, Madison <Le.Madison@epa.gov>; Levy, Aaron <Levy.Aaron@epa.gov>; Li, Ryland (Shengzhi) <Li.Ryland@epa.gov>; Lie, Sharyn <Lie.Sharyn@epa.gov>; Machiele, Paul <machiele.paul@epa.gov>; Manners, Mary <manners.mary@epa.gov>; Master, Barbora <Master.Barbora@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Shelby, Michael <Shelby.Michael@epa.gov>; Simon, Karl <Simon.Karl@epa.gov>; Sobel, Aaron <Sobel.Aaron@epa.gov>; Stahle, Susan

<Stahle.Susan@epa.gov>; Sutton, Tia <sutton.tia@epa.gov>; Weihrauch, John <Weihrauch.John@epa.gov>

Subject: Agenda for Wednesday's fuels weekly

Hi folks—please see attached agenda for Wednesday morning.

A hand-out with details on small refinery issues will be circulated tomorrow morning.

Thanks,
Ben

Message

From: Stahle, Susan [Stahle.Susan@epa.gov]
Sent: 1/23/2018 3:08:19 PM
To: Cohen, Janet [cohen.janet@epa.gov]; McKenna, Chris [McKenna.Chris@epa.gov]
CC: Parsons, Nick [Parsons.Nick@epa.gov]; Michaels, Lauren [Michaels.Lauren@epa.gov]; Orlin, David [Orlin.David@epa.gov]; Li, Ryland (Shengzhi) [Li.Ryland@epa.gov]
Subject: RE: HollyFrontier-Cheyenne 2015 decision remand
Attachments: HFC-Cheyenne 2015 RFS hardship remand decision document - final rev1 (ogc 012318).docx

Hi --

Attached is a decision document that includes OGC edits on the paragraphs below. This should now be good to go.

Thanks,

Susan Stahle
Attorney-Advisor
Air and Radiation Law Office
Office of General Counsel
U.S. Environmental Protection Agency
202-564-1272 (ph)
202-564-5603 (fax)
stahle.susan@epa.gov

-----Original Message-----

From: Stahle, Susan
Sent: Thursday, January 11, 2018 3:56 PM
To: Cohen, Janet <cohen.janet@epa.gov>; McKenna, Chris <mckenna.chris@epa.gov>
Cc: Parsons, Nick <Parsons.Nick@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Li, Ryland (Shengzhi) <Li.Ryland@epa.gov>
Subject: RE: HollyFrontier-Cheyenne 2015 decision remand

I want to give David Orlin a chance to review these two paragraphs from page 4 - **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP)

Susan Stahle
Attorney-Advisor
Air and Radiation Law Office
Office of General Counsel
U.S. Environmental Protection Agency
202-564-1272 (ph)
202-564-5603 (fax)
stahle.susan@epa.gov

-----Original Message-----

From: Cohen, Janet
Sent: Thursday, January 11, 2018 3:49 PM
To: McKenna, Chris <McKenna.Chris@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>

Cc: Parsons, Nick <Parsons.Nick@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Li, Ryland (Shengzhi) <Li.Ryland@epa.gov>
 Subject: RE: HollyFrontier-Cheyenne 2015 decision remand

Thanks all. I think these are ready for Chris' signature now, unless Byron wants to look at them. I will send Byron and Ben a status update and will also mention that Island Energy 2016 is next up. You (OGC) have what you need to review that one, correct? - j. -

-----Original Message-----

From: McKenna, Chris
 Sent: Thursday, January 11, 2018 3:37 PM
 To: Stahle, Susan <Stahle.Susan@epa.gov>
 Cc: Parsons, Nick <Parsons.Nick@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Li, Ryland (Shengzhi) <Li.Ryland@epa.gov>
 Subject: RE: HollyFrontier-Cheyenne 2015 decision remand

Sue,

Thanks - I revised the David O version of the decision document and accepted the changes. Clean versions of the revised decision document and the previous cover letter are attached for further review.

Thanks again,
 Chris

-----Original Message-----

From: Stahle, Susan
 Sent: Thursday, January 11, 2018 3:14 PM
 To: McKenna, Chris <McKenna.Chris@epa.gov>
 Cc: Parsons, Nick <Parsons.Nick@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Li, Ryland (Shengzhi) <Li.Ryland@epa.gov>
 Subject: RE: HollyFrontier-Cheyenne 2015 decision remand

Thanks Chris. David took a look at the previous version and asked for some more detail on pg 3. It is included in the above version, which is what I sent you previously (have not looked at your revised version). Would you mind adding this to the decision document? No changes to the letter.

Susan Stahle
 Attorney-Advisor
 Air and Radiation Law Office
 Office of General Counsel
 U.S. Environmental Protection Agency
 202-564-1272 (ph)
 202-564-5603 (fax)
 stahle.susan@epa.gov

-----Original Message-----

From: McKenna, Chris
 Sent: Thursday, January 11, 2018 3:08 PM
 To: Stahle, Susan <Stahle.Susan@epa.gov>
 Cc: Parsons, Nick <Parsons.Nick@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Li, Ryland (Shengzhi) <Li.Ryland@epa.gov>
 Subject: RE: HollyFrontier-Cheyenne 2015 decision remand

Sue,

Thanks very much for the quick review - I made some revisions to the decision document per your comments, and accepted all the changes to the decision document and cover letter. I've attached clean copies of both for further review by David and others.

Thanks again,
 Chris

-----Original Message-----

From: Stahle, Susan
 Sent: Thursday, January 11, 2018 2:00 PM
 To: McKenna, Chris <McKenna.Chris@epa.gov>
 Cc: Parsons, Nick <Parsons.Nick@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Li, Ryland (Shengzhi) <Li.Ryland@epa.gov>
 Subject: RE: HollyFrontier-Cheyenne 2015 decision remand

Hi Chris --

Here are my edits to the decision document and letter. These are to conform to the final versions of the documents that were sent out. These look good and should be ready to go (barring any further review by David Orlin).

I will note I stayed in Cheyenne on my drive out to UT - very cold. I sure saw a lot of refineries there. I also drove past the HF WC refinery several times while in UT

Ex. 6 Personal Privacy (PP)

Ex. 6 Personal Privacy (PP)

I also drove past the Sinclair WY refinery twice - it really is in the middle of nowhere. I just can't get away from these small refineries.... :)

Susan Stahle
Attorney-Advisor
Air and Radiation Law Office
Office of General Counsel
U.S. Environmental Protection Agency
202-564-1272 (ph)
202-564-5603 (fax)
stahle.susan@epa.gov

-----Original Message-----

From: McKenna, Chris
Sent: Thursday, January 04, 2018 10:46 AM
To: Stahle, Susan <Stahle.Susan@epa.gov>; Li, Ryland (Shengzhi) <Li.Ryland@epa.gov>; Orlin, David <Orlin.David@epa.gov>
Cc: Parsons, Nick <Parsons.Nick@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>
Subject: RE: HollyFrontier-Cheyenne 2015 decision remand

Sue/Ryland/David,

I've attached draft versions of the decision document and response letter to HollyFrontier for our re-decision on their 2015 Cheyenne refinery RFS hardship petition. Please review both and send me your edits. I used the decision document and response letter from **Ex. 5 Deliberative Process (DP)** decision as starting templates

Thanks,
Chris

-----Original Message-----

From: Parsons, Nick
Sent: Thursday, January 04, 2018 8:29 AM
To: Larson, Ben <Larson.Ben@epa.gov>; McKenna, Chris <McKenna.Chris@epa.gov>
Cc: Weihrauch, John <Weihrauch.John@epa.gov>; Kim, Jung <Kim.Jung@epa.gov>
Subject: RE: HollyFrontier-Cheyenne 2015 decision remand

Yes, it would be RINS retired by HF for the 2015 compliance year.

Ex. 4 CBI

Ex. 4 CBI

this exemption would only be for their Cheyenne refinery,

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

- Nick

-----Original Message-----

From: Larson, Ben
Sent: Thursday, January 04, 2018 6:00 AM
To: McKenna, Chris <McKenna.Chris@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>
Cc: Weihrauch, John <Weihrauch.John@epa.gov>; Kim, Jung <Kim.Jung@epa.gov>
Subject: Re: HollyFrontier-Cheyenne 2015 decision remand

Gentlemen,

Thank you for the notification. Just to clarify, when we say "in 2015", does that refer only towards RINS retired towards the 2015 compliance year for the RVO?

Thanks,
-Ben

From: McKenna, Chris
Sent: Wednesday, January 3, 2018 4:08:11 PM
To: Parsons, Nick
Cc: Larson, Ben; Weihrauch, John; Kim, Jung
Subject: HollyFrontier-Cheyenne 2015 decision remand

Nick,

Ex. 4 CBI

Thx again,
Chris

From: Parsons, Nick
Sent: Wednesday, January 03, 2018 2:45 PM

To: McKenna, Chris <McKenna.Chris@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Orlin, David <Orlin.David@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>
 Cc: Stahle, Susan <Stahle.Susan@epa.gov>; Li, Ryland (Shengzhi) <Li.Ryland@epa.gov>
 Subject: RE: I spoke to Tim Webster at Sidley this morning...

Here's the final version of the 2015 **Ex. 4 CBI** decision for you to use.

- Nick

From: McKenna, Chris
 Sent: Wednesday, January 03, 2018 2:43 PM
 To: Parsons, Nick <Parsons.Nick@epa.gov<mailto:Parsons.Nick@epa.gov>>; Michaels, Lauren <Michaels.Lauren@epa.gov<mailto:Michaels.Lauren@epa.gov>>; Orlin, David <Orlin.David@epa.gov<mailto:Orlin.David@epa.gov>>; Cohen, Janet <cohen.janet@epa.gov<mailto:cohen.janet@epa.gov>>
 Cc: Stahle, Susan <Stahle.Susan@epa.gov<mailto:Stahle.Susan@epa.gov>>; Li, Ryland (Shengzhi) <Li.Ryland@epa.gov<mailto:Li.Ryland@epa.gov>>
 Subject: RE: I spoke to Tim Webster at Sidley this morning...

Ex. 5 Deliberative Process (DP)

From: Parsons, Nick
 Sent: Wednesday, January 03, 2018 2:37 PM
 To: Michaels, Lauren <Michaels.Lauren@epa.gov<mailto:Michaels.Lauren@epa.gov>>; Orlin, David <Orlin.David@epa.gov<mailto:Orlin.David@epa.gov>>; Cohen, Janet <cohen.janet@epa.gov<mailto:cohen.janet@epa.gov>>; McKenna, Chris <McKenna.Chris@epa.gov<mailto:McKenna.Chris@epa.gov>>
 Cc: Stahle, Susan <Stahle.Susan@epa.gov<mailto:Stahle.Susan@epa.gov>>; Li, Ryland (Shengzhi) <Li.Ryland@epa.gov<mailto:Li.Ryland@epa.gov>>
 Subject: RE: I spoke to Tim Webster at Sidley this morning...

Ex. 5 Deliberative Process (DP)

- Nick

From: Michaels, Lauren
 Sent: Wednesday, January 03, 2018 2:36 PM
 To: Orlin, David <Orlin.David@epa.gov<mailto:Orlin.David@epa.gov>>; Cohen, Janet <cohen.janet@epa.gov<mailto:cohen.janet@epa.gov>>; Parsons, Nick <Parsons.Nick@epa.gov<mailto:Parsons.Nick@epa.gov>>
 Cc: Stahle, Susan <Stahle.Susan@epa.gov<mailto:Stahle.Susan@epa.gov>>; Li, Ryland (Shengzhi) <Li.Ryland@epa.gov<mailto:Li.Ryland@epa.gov>>
 Subject: RE: I spoke to Tim Webster at Sidley this morning...

Ex. 5 Deliberative Process (DP)

From: Orlin, David
 Sent: Wednesday, January 03, 2018 2:32 PM
 To: Cohen, Janet <cohen.janet@epa.gov<mailto:cohen.janet@epa.gov>>; Michaels, Lauren <Michaels.Lauren@epa.gov<mailto:Michaels.Lauren@epa.gov>>; Parsons, Nick <Parsons.Nick@epa.gov<mailto:Parsons.Nick@epa.gov>>
 Cc: Stahle, Susan <Stahle.Susan@epa.gov<mailto:Stahle.Susan@epa.gov>>; Li, Ryland (Shengzhi) <Li.Ryland@epa.gov<mailto:Li.Ryland@epa.gov>>
 Subject: Fwd: I spoke to Tim Webster at Sidley this morning...

I assume no one would have a problem if we told the court we intend to act promptly on HollyFrontier's 2015 petition if it is remanded to us, but could someone please confirm that?

thanks

Begin forwarded message:

From: "Pinkston, Daniel (ENRD)" <Daniel.Pinkston@usdoj.gov<mailto:Daniel.Pinkston@usdoj.gov>>
 Date: January 3, 2018 at 12:44:15 PM EST
 To: "Stahle, Susan" <Stahle.Susan@epa.gov<mailto:Stahle.Susan@epa.gov>>, "Orlin, David" <Orlin.David@epa.gov<mailto:Orlin.David@epa.gov>>, "Hostetler, Eric (ENRD)" <Eric.Hostetler@usdoj.gov<mailto:Eric.Hostetler@usdoj.gov>>
 Subject: I spoke to Tim Webster at Sidley this morning...

Ex. 5 Attorney Client (AC) / Attorney Work Product

Thoughts?

Daniel (Dan) Pinkston
Senior Trial Attorney
U.S. Department of Justice
999 18th St., South Terrace, Suite 370, Denver, CO 80202 303.844.1804,
daniel.pinkston@usdoj.gov<mailto:daniel.pinkston@usdoj.gov>

Message

From: Parsons, Nick [Parsons.Nick@epa.gov]
Sent: 6/19/2020 2:53:32 PM
To: Birgfeld, Erin [Birgfeld.Erin@epa.gov]; Mylan, Christopher [Mylan.Christopher@epa.gov]; Hengst, Benjamin [Hengst.Benjamin@epa.gov]
CC: Cohen, Janet [cohen.janet@epa.gov]; Bunker, Byron [bunker.byron@epa.gov]
Subject: SRE Politico Article Correction

Not sure if it's worth correcting the record here, but the highlighted statement below from Politico is factually inaccurate. All small refineries were exempted through 2010. While the process for obtaining an exemption was different for 2011 and 2012, they still needed to petition for one.

TAKING A GAP YEAR: Oil refineries have filed 52 new, so-called gap year petitions to EPA seeking economic hardship designations from the Renewable Fuel Standard for years going back to 2011, Pro's Eric Wolff reports. The retroactive petitions mark an effort by companies to make them eligible to receive waivers freeing them from current biofuel blending requirements.

EPA's small refinery exemption dashboard was updated Thursday to show petitions that go back to the beginning of the program in 2011. The agency had issued a blanket waiver for all small refiners in 2011 and 2012, but observers have said the six applications for each of those years may be for refineries that were not eligible at that time.

The dashboard also shows 10 petitions for 2013, 11 for 2014, 10 for 2015 and a handful of additional requests for more recent years.

Nick Parsons • Chemical Engineer • Office of Transportation and Air Quality • U.S. Environmental Protection Agency
734.214.4479 • parsons.nick@epa.gov • 2000 Traverwood Dr, Ann Arbor, MI 48105

"No man is more important than the team." -Bo Schembechler

Message

From: Dominguez, Alexander [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=5CED433B4EF54171864ED98A36CB7A5F-DOMINGUEZ,]
Sent: 8/22/2018 2:43:13 PM
To: Mandy Gunasekara (Gunasekara.Mandy@epa.gov) [Gunasekara.Mandy@epa.gov]
Subject: Updated - Ohio Talkers
Attachments: OAR OH Travel Briefing_Draft (v1).docx; Ohio Nonattainment Maps Compiled.pdf; SAFE Fact Sheet Binder.pdf

Ex. 5 Deliberative Process (DP)

Attached is everything I planned to send to Stephen for OH.

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Give me a call if you would like (and please do if you have the time).

From: Gordon, Stephen
Sent: Monday, August 20, 2018 3:25 PM
To: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Woods, Clint <woods.clint@epa.gov>; Dominguez, Alexander <dominguez.alexander@epa.gov>; Harlow, David <harlow.david@epa.gov>
Cc: Bennett, Tate <Bennett.Tate@epa.gov>
Subject: Ohio Talkers

OAR – Could you all please provide a one-pager on NAAQ's, CPP, OOOOa and CAFE for Administrator Wheeler's trip to Ohio on August 28th? Could you also include any other Ohio specific talkers as well? We will be visiting with Ohio Chamber of Commerce members in Columbus Ohio and local government officials in Zanesville, Ohio.

The deadline for the talkers is Wednesday, August 22nd at noon. I know you all are slammed right now sorry about the quick turnaround time!

-Stephen

Stephen L. Gordon Jr.
Deputy Director for Public Engagement
Office of the Administrator
U.S. Environmental Protection Agency
(202) 734-0666
Gordon.Stephen@epa.gov

Message

From: Dominguez, Alexander [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=5CED433B4EF54171864ED98A36CB7A5F-DOMINGUEZ,]
Sent: 8/21/2018 9:47:58 PM
To: Gunasekara, Mandy [Gunasekara.Mandy@epa.gov]; Woods, Clint [woods.Clint@epa.gov]; Harlow, David [harlow.david@epa.gov]
Subject: RE: Ohio Talkers
Attachments: OAR OH Travel Briefing_Draft (v1).docx; oh25_2012.pdf; ohso2_2010.pdf; 2015_Ozone_final_060418.pdf

Attached is draft travel memo for revisions. For CPP I'll include the final ACE rollout materials. I did not include any Ohio specific talkers on here.

From: Gordon, Stephen
Sent: Monday, August 20, 2018 3:25 PM
To: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>; Woods, Clint <woods.clint@epa.gov>; Dominguez, Alexander <dominguez.alexander@epa.gov>; Harlow, David <harlow.david@epa.gov>
Cc: Bennett, Tate <Bennett.Tate@epa.gov>
Subject: Ohio Talkers

OAR – Could you all please provide a one-pager on NAAQ's, CPP, OOOOa and CAFE for Administrator Wheeler's trip to Ohio on August 28th? Could you also include any other Ohio specific talkers as well? We will be visiting with Ohio Chamber of Commerce members in Columbus Ohio and local government officials in Zanesville, Ohio.

The deadline for the talkers is Wednesday, August 22nd at noon. I know you all are slammed right now sorry about the quick turnaround time!

-Stephen

Stephen L. Gordon Jr.
Deputy Director for Public Engagement
Office of the Administrator
U.S. Environmental Protection Agency
(202) 734-0666
Gordon.Stephen@epa.gov

Appointment

From: O'Donnell, Jessica (ENRD) [Jessica.O'Donnell@usdoj.gov]
Sent: 8/22/2019 2:25:45 PM
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Subject: Moot court: Advanced Biofuels Ass'n v. EPA (DC Cir)

Attachments: ENV_DEFENSE-#879685-v1-advanced_biofuels_28(j)_letter_citing_Aug_9_decision.PDF; ENV_DEFENSE-#872080-v1-DN_1796068_APPELLEE_FINAL_BRIEF__1796068__filed_by_EPA_and_Andrew_Wheeler__Service_Date__07_08_2019__Length_1115__(O_D.PDF; ENV_DEFENSE-#871340-v1-DN_1794504_INTERVENOR_FOR_APPELLEE_FINAL_BRIEF__1794504__filed_by_HollyFrontier_Refining_&_Marketing_LLC__Service_Date__07_08_2019__Length_1115__(O_D.PDF; ENV_DEFENSE-#871338-v1-DN_1794498_APPELLANT_FINAL_REPLY_BRIEF__1794498__filed_by_Advanced_Biofuels_Association__Service_Date__06_25_2019__Length_1115__(O_D.PDF; ENV_DEFENSE-#871185-v1-DN_1794208_RESPONSE__1794208__to_letter_Rule_28j_authorities__1794009-2__letter__1794009-3__filed_by_Advanced_Biofuels_Association__Service_Date__06_25_2019__Length_1115__(O_D.PDF; ENV_DEFENSE-#871142-v1-DN_1794009_LETTER__1794009__pursuant_to_FRAP_28j_advising_of_additional_authorities_filed_by_EPA_and_Andrew_Wheeler__Service_Date__06_25_2019__Length_1115__(O_D.PDF; ABFA Final Opening Brief 6-25-2019 Under Seal Version.pdf

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All – the briefs for this moot are attached. I'm also circulating a few 28(j) letters that were submitted to the court.

All – the court has scheduled oral argument in the above-referenced case for Friday, October 25, 2019. I'm proposing a moot court at the above-noted time and date. Please let me know if this time/date poses a problem for you. Otherwise, I'll circulate the briefs about a week in advance.

Sue – please feel free to circulate more broadly within EPA, as appropriate. If you could just let me know about a week before who EPA's in-person attendees are, I would appreciate it.

For anyone wanting to participate by phone, please use this number:

Ex. 6 Personal Privacy (PP)

Thanks,
 Jessica

UNDER SEAL

SUBJECT TO PROTECTIVE ORDER IN CASE NO. 18-1115 (D.C. CIR.)

ORAL ARGUMENT NOT YET SCHEDULED

No. 18-1115

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ADVANCED BIOFUELS ASSOCIATION,

Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

On Petition for Review from the Environmental Protection Agency

FINAL PRINCIPAL BRIEF OF PETITIONER

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to D.C. Circuit Rules 26.1 and 28(a)(1), and Fed. R. App. P. 26.1, the undersigned counsel certifies as follows:

(A) Parties.

The Petitioner is the Advanced Biofuels Association (“ABFA”).

The Respondents are the U.S. Environmental Protection Agency (“EPA”) and Scott Wheeler in his role as Administrator of the EPA. Former EPA Administrator Scott Pruitt was originally named in this action, but following his resignation effective July 6, 2018, Andrew Wheeler is substituted Pursuant to Fed. R. App. P. 43(c)(2).

HollyFrontier Refining & Marketing LLC is an Intervenor in support of Respondents.

(B) Rulings Under Review.

ABFA petitions for review of the following final agency actions by EPA: (1) the modification of the methodology by which the Agency determines whether small refineries are experiencing “disproportionate economic hardship” necessary to be eligible for extensions of their prior temporary exemptions from the Clean Air Act’s Renewable Fuel Standards Program (“RFS Program”), pursuant to 42 U.S.C. § 7545(o)(9); (2) the unlawful and arbitrary and capricious consideration of information unrelated to disproportionate economic hardship when granting small

refinery exemptions; and (3) the granting of extensions of temporary exemptions to small refineries that did not receive exemptions in all prior compliance years.

(C) Related Cases.

On May 1, 2018, a petition for review was filed in the U.S. Court of Appeals for the Tenth Circuit (*Renewable Fuels Ass'n v. EPA*, No. 18-9533) challenging small refinery exemptions that EPA granted to three individual small refineries geographically located within the Tenth Circuit. Two of the three refineries involved in the Tenth Circuit case are owned by HollyFrontier, the Intervenor in this case. While EPA's final decisions to grant exemptions to those three small refineries likely suffer from the legal flaws challenged in ABFA's petition, ABFA is challenging the policies and methodologies by which EPA evaluates and grants all small refinery petitions rather than individual exemptions granted to any particular small refinery.

On July 31, 2018, *Producers of Renewables United for Integrity Truth and Transparency v. EPA*, Case No. 18-1202 (D.C. Cir.) filed a petition for review with this Court. The petition raises issues with EPA's administration of the RFS Program that are distinct from ABFA's claims, with the exception that both actions challenge EPA's policy of granting "extensions" of temporary exemptions that have ended.

June 25, 2019

/s/ Rafe Petersen
Rafe Petersen

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Circuit Rules 26.1 and 2(a)(1)(A), Petitioner makes the following disclosure:

The Advanced Biofuels Association (“ABFA”) certifies that it is an independent 501(c)(6) nonprofit trade association that has been registered in the District of Columbia since 2009. ABFA has no parent corporation, and no publicly held company has ten percent or greater ownership in ABFA.

ABFA represents more than 35 companies in the United States and around the world engaged in the production, marketing, and distribution of advanced renewable fuels regulated under the Clean Air Act’s Renewable Fuel Standard.

Currently, ABFA members produce over 4.4 billion gallons of renewable fuel each year, including billions of gallons of biodiesel and renewable diesel as well as a variety of drop-in fuels such as isobutanol, dimethyl ether, cellulosic ethanol, and cellulosic heating oil. ABFA’s mission is to secure a stable regulatory environment and level playing field for advanced renewable fuels on behalf of its members.

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GLOSSARY

APA	Administrative Procedure Act
ABFA	Advanced Biofuels Association
CAA	Clean Air Act
DOE	Department of Energy
EPA	U.S. Environmental Protection Agency
FOIA	Freedom of Information Act
JA	Joint Appendix
RFS	Renewable Fuel Standards
RIN	Renewable Identification number

JURISDICTIONAL STATEMENT

This Court has subject matter jurisdiction pursuant to the Clean Air Act (“CAA”), 42 U.S.C. § 7607(b)(1), which states that “[a] petition for review of . . . any . . . nationally applicable . . . final action taken, by the Administrator [of EPA] . . . may be filed only in the United States Court of Appeals for the District of Columbia.”

Petitioner Advanced Biofuels Association (“ABFA”) is challenging the following final agency actions by EPA: (1) its sudden and unexplained modification of the methodology it uses to evaluate petitions from small refineries to receive exemptions from complying with the Renewable Fuel Standards (“RFS”) Program; (2) its consideration, when evaluating petitions for small refinery exemptions, of information that has no rational relationship to whether the small refineries are experiencing “disproportionate economic hardship”; and (3) its grant of “extensions” of temporary exemptions from compliance with the RFS Program to small refineries not covered by such temporary exemptions in prior years. While EPA did not provide public notice of its final agency actions and has made every attempt to avoid disclosing information about its administration of the RFS Program, evidence of these final agency actions is apparent in the 48 small refinery exemption decision documents that EPA produced in its Certified Index.

ABFA filed its petition for review in the D.C. Circuit because EPA's final actions are nationally applicable as they apply equally to dozens of small refineries across the nation.

ABFA's petition was timely filed. CAA Section 307(b)(1) provides:

Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

42 U.S.C. § 7607(b)(1). EPA did not publish notice of the final agency actions at issue in the Federal Register. Accordingly, the deadline for ABFA to file its petition was sixty days after such grounds arise. ABFA filed its petition for review on May 1, 2018, soon after credible newspaper articles published in April 2018 reported that EPA was granting exemptions to an unprecedented number of small refineries.¹ Accordingly, ABFA satisfied the CAA's timing requirement by filing its petition within sixty days of becoming aware of EPA's final agency actions.

EPA argues that ABFA's petition fails to challenge a discrete, final agency action and was filed in the wrong venue under the theory that EPA's final decisions on small refinery exemptions must be challenged individually in the Court of Appeals for the Circuit in which the refinery is located. Doc. No. 1740614. The

¹ See ABFA Petition for Review, Doc. No. 1729543, n. 1.

Court's Order of October 11, 2018 referred EPA's Motion to Dismiss to the merits panel and directed the parties to address in their briefs the issues presented in the motions. Doc. No. 1754684. Accordingly, ABFA explains more fully in the Argument Section why its petition for review is a challenge to nationally applicable final agency actions that is properly before this Court.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1) Whether EPA's substantial change to the methodology by which it determines "disproportionate economic hardship" when evaluating small refineries' petitions for extensions of temporary exemptions from compliance with the CAA's RFS Program, such that a small refinery is deemed to suffer disproportionate economic hardship as a result of structural impacts that do not affect competitiveness or profitability, is a final agency action that is arbitrary, capricious, not in accordance with law, and in excess of EPA's statutory authority under the Administrative Procedures Act ("APA") 5 U.S.C. § 706;

2) Whether EPA violated the APA by granting, in excess of the agency's statutory authority and in a manner that is arbitrary and capricious, extensions of temporary exemptions from compliance with the RFS Program to small refineries based on the consideration of information unrelated to whether the small refineries are experiencing "disproportionate economic hardship" required by 42 U.S.C. § 7545(o)(9)(B)(i); and

3) Whether EPA is violating the APA by granting, in excess of its statutory authority, “extensions” of temporary exemptions from compliance with the RFS Program to small refineries that were not covered by temporary exemptions in all preceding compliance years.

STATUTES AND REGULATIONS

The full text of 42 U.S.C. § 7607(b)(1), the statute under which ABFA filed its petition for review, is provided in Addendum 1. Also contained in Addendum 1 is the relevant language from 42 U.S.C. § 7545(o)(9), the section of the CAA that allows a small refinery to petition EPA for an extension of its temporary exemption from the requirements of the RFS Program and the circumstances under which EPA may grant an extension of a temporary exemption.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

A. Clean Air Act Renewable Fuel Standards Program²

In 2005, Congress amended the Clean Air Act (“CAA”) to create the Renewable Fuel Standards (“RFS”) Program to increase the domestic use of renewable fuels and to set annual renewable fuels target volumes through 2022.³

² In *Hermes Consol. v. EPA*, 787 F.3d 568, 572-74 (D.C. Cir. 2015), this Court summarized the RFS Program and the process by which a small refinery may petition EPA for an extension of its temporary exemption from RFS compliance.

³ Energy Policy Act of 2005, Pub. L. No. 109-58 (2005).

Congress authorized EPA to develop a program “to ensure that transportation fuel sold or introduced into commerce . . . on an annual average basis, contains at least the applicable volume of renewable fuel, advanced biofuel, cellulosic biofuel, and biomass diesel . . .” set by Congress.⁴ The RFS Program sought “to reduce dependence on foreign sources of petroleum, increase domestic sources of energy, and help transition to alternatives to petroleum in the transportation sector.”⁵

The RFS Program requires the U.S. Energy Information Administration to estimate the amount of transportation fuel expected to be sold in the upcoming year.⁶ EPA then divides the renewable fuels benchmark set by Congress by the Energy Information Administration’s estimated annual fuel volume, yielding a required percentage of the total fuel volume that must consist of renewable fuels. Obligated parties under the RFS Program—refineries and fuel importers—must demonstrate that they have satisfied their proportionate share of the overall renewable fuel obligations. For example, if the required renewable fuels percentage is 10 percent, a refinery that produces 100,000 gallons of fuel a year must satisfy a renewable fuels volume obligation of 10,000 gallons.⁷

⁴ 42 U.S.C. § 7545(o)(2)(A)(i).

⁵ U.S. EPA, Renewable Fuel Standard Program, 72 Fed. Reg. 23900 (May 1, 2007).

⁶ 42 U.S.C. § 7545(o)(3)(A).

⁷ See 40 C.F.R. § 80.1407 and *Hermes Consol.*, 787 F.3d 568, 572 (D.C. Cir. 2015) (explaining obligation calculations).

Obligated refineries and fuel importers can comply with the RFS Program in two ways: (1) by directly blending the required percentage of renewable fuel into the traditional fuels that they refine or import; or (2) by purchasing Renewable Identification Numbers (“RINs”) associated with volumes of renewable fuel produced or imported by third parties.

A unique RIN is generated and conceptually attached to each gallon of newly created renewable fuel produced for use in the U.S.⁸ Once renewable fuel is blended with conventional fuel, the RIN separates from the gallon of renewable fuel that gave rise to its generation. At that point of separation, the entity that blended the renewable fuel with conventional fuel can either (1) keep the RINs to meet its obligations under the RFS Program; or (2) sell the separated RINs to other obligated parties.

Many obligated parties—including small refineries—have not installed the equipment necessary to blend renewable fuel into the conventional fuels they produce and instead meet their RFS obligations by purchasing RINs. Obligated parties must annually submit to EPA by March 31st a report documenting that they possess RINs sufficient to meet their obligations under the RFS Program for the previous calendar year.⁹ Obligated parties can carry a compliance deficit beyond

⁸ 40 C.F.R. § 80.1426(a).

⁹ 40 C.F.R. § 80.1451(a)(1).

March 31st of a given year as long as the deficit is satisfied the following year. A deficit cannot be carried into a second consecutive year.¹⁰

RINs are retired once an obligated party submits them to EPA.¹¹ RINs can only satisfy RFS Program obligations for the compliance year they were generated or the following compliance year.¹² RINs generated in calendar year 2014, therefore, cannot satisfy RFS Program obligations beyond compliance year 2015. RINs that are not submitted within two years permanently expire.¹³

In compliance years 2016 and 2017, over 19 billion RINs were generated.¹⁴ A robust marketplace exists in which obligated parties that need RINs can purchase them from companies, such as ABFA's members, that produce and blend renewable fuels. The Oil Price Information Service, a business that provides global fuel market pricing information, follows RIN prices just as it does traditional fuels.¹⁵

A sudden decrease in the needs of obligated parties to purchase RINs to comply with the RFS Program naturally causes RIN prices to decline, which in turn reduces the amount of money that producers of renewable fuels—such as ABFA's

¹⁰ 40 C.F.R. § 80.1127(b).

¹¹ 40 C.F.R. § 80.1427(a)(1).

¹² 40 C.F.R. § 80.1428(c).

¹³ *Id.*

¹⁴ U.S. EPA, Fuels Registration, Reporting, and Compliance Help: RINS Generated Transactions, <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rins-generated-transactions>.

¹⁵ See Oil Price Information Service, Ethanol & Biodiesel Information Service, <https://www.opisnet.com/> (last visited Mar. 2, 2019).

members—can generate. Because RINs have a two-year shelf life and no value outside of the RFS Program, producers of renewable fuel cannot cure or minimize losses in the event of a sudden drop in RIN demand.

B. Temporary Small Refinery Exemptions under the RFS Program

Congress recognized that small refineries, defined at 42 U.S.C. § 7545(o)(1)(K) as refineries with average crude oil throughput of 75,000 barrels or less per day, might initially have difficulty complying with the RFS Program. Many small refineries did not have infrastructure to be able to blend renewable fuels into conventional fuels and would therefore need to rely on the purchase of RINs to meet their RFS obligations. To address this concern, Congress granted all small refineries in existence at the start of the RFS Program a temporary blanket exemption from compliance with the RFS Program through compliance year 2010.¹⁶ At the end of the temporary blanket exemption, however, “small refineries would be required to meet the same renewable fuel obligations as all other refineries, unless their exemption is extended”¹⁷

To assess whether further extensions of the temporary blanket exemption were needed, Congress ordered the U.S. Department of Energy (“DOE”) to conduct

¹⁶ 42 U.S.C. § 7545(o)(9)(A)(i). *See also Hermes Consol.*, 787 F.3d 568, 572-73 (D.C. Cir. 2015)(“That blanket exemption gave small refineries time to develop compliance strategies and increase blending capacity.”)

¹⁷ U.S. EPA, Renewable Fuel Standard Program, 72 Fed. Reg. 23900, 23924 (May 1, 2007).

a study “to determine whether compliance . . . would impose a disproportionate economic hardship on small refineries.”¹⁸ For any small refinery that DOE determined would suffer “disproportionate economic hardship” from complying with the RFS Program, Congress directed EPA to “extend the [temporary] exemption [] for the small refinery for a period of not less than 2 additional years.”¹⁹

While many CAA mandates provide regulated entities the ability to apply for general hardship exemptions or temporary exemptions based on unforeseen circumstances, EPA determined that the ability of obligated parties to purchase RINs from the nationwide trading program rendered such exemptions unnecessary under the RFS Program.²⁰

C. Two-Year Extensions of Temporary Exemptions After DOE Study

As part of its Congressionally-mandated study, DOE created a scoring methodology to evaluate whether a small refinery would suffer disproportionate economic hardship from complying with the RFS Program. DOE’s methodology evaluates twelve metrics and produces two independent index scores.²¹ First, DOE’s disproportionate impacts index measures the structural impact metrics (i.e., poor access to capital and credit, lack of other business lines, and high percentage of diesel

¹⁸ *Id.* at § 7545(o)(9)(A)(ii)(I).

¹⁹ *Id.* at § 7545(o)(9)(A)(ii)(II).

²⁰ U.S. EPA, 72 Fed. Reg. 23900, 23926 (May 1, 2007).

²¹ All decision documents in EPA’s Certified Index contain the metrics that DOE evaluates to generate the two index scores.

production) and economic impact metrics (i.e, refining margins and low rate of renewable fuel blending) faced by a small refinery complying with the RFS Program. Second, DOE's viability index assesses how RFS Program compliance would impact a small refinery's ability to remain competitive and profitable.²² DOE's 2011 Study recommended a finding of disproportionate economic hardship only when a small refinery's average scores for both indices are greater than 1.²³

DOE's study solicited detailed information from each of the 59 facilities that qualified as a "small refinery" to determine RFS Program's economic impact. Of those 59 facilities, only 18 bothered to submit information to DOE about the hardships they might face.²⁴ The low participation rate was partially attributable to the fact that many small refineries that were "part of large integrated oil companies or large geographically diverse refiners . . . notified DOE that they were not going to respond to the survey because they did not believe they faced disproportionate economic hardship."²⁵ Several small refineries later provided information to EPA after DOE's study. EPA decided to extend the temporary small refinery exemption for two years – compliance years 2011 and 2012 – to 24 small refineries. DOE concluded that the remaining 35 small refineries would not suffer a disproportionate

²² DOE Small Refinery Exemption Study, R-108 at 32-36 (JA42-JA46).

²³ *Id.* at 37 (JA47).

²⁴ *Id.*

²⁵ *Id.*

economic hardship from complying with the RFS Program. Accordingly, those 35 small refineries were required to start complying with the RFS Program by either blending renewable fuel or purchasing RINs.²⁶

D. Extensions of Temporary Exemptions Via Individual Petitions

For compliance year 2013 and beyond, the only avenue that Congress provided for a small refinery to avoid the obligations of the RFS Program is to submit an individual petition to EPA. Congress provided that “[a] small refinery may at any time petition the Administrator [of EPA] for an extension of the exemption under subparagraph (A) [temporary exemptions] for the reason of disproportionate economic hardship.”²⁷ EPA regulations similarly provide that “[a] refiner may petition the Administrator for an extension of its small refinery exemption, based on disproportionate economic hardship, at any time.”²⁸ When evaluating small refineries’ petitions seeking extensions of their temporary exemptions, Congress directed EPA to consult with DOE, consider the findings of DOE’s 2011 study, and consider “other economic factors.”²⁹

²⁶ U.S. EPA, RFS Small Refinery Exemptions, hereinafter “EPA Small Refinery Exemption Dashboard,” <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions> (“For 2011 and 2012, 24 small refineries were granted an exemption . . .”).

²⁷ 42 U.S.C. § 7545(o)(9)(B)(i).

²⁸ 40 C.F.R. § 80.1441(e)(2).

²⁹ 42 U.S.C. § 7545(o)(9)(B)(ii).

1. Extensions of Temporary Small Refinery Exemptions in Compliance Years 2013-15

While Congress was sympathetic to the burdens that the new RFS Program might cause small refineries, it anticipated that this would decrease over time. Accordingly, the initial temporary blanket exemption covering all 59 small refineries through compliance year 2010 gave way to a two-year extension of the temporary exemptions to only 24 small refineries identified through DOE's Study.

The data below, made available by EPA only after ABFA filed its petition for review, shows that for compliance years 2013 to 2015 an average of only 14 small refineries petitioned EPA for extensions their temporary exemptions. Over this three-year period EPA granted 23 of the 43 petitions received, an approval rate of 53 percent.³⁰

Compliance Year	Number of Petitions Received	Number of Grants Issued	Number of Denials Issued	Number of Petitions Declared Indelible or Withdrawn	Number of Pending Petitions
2013	16	8	7	1	0
2014	13	8	5	0	0
2015	14	7	6	1	0

³⁰ See EPA Small Refinery Exemption Dashboard, *supra* note 26.

2. EPA Denial of Small Refinery Petitions

Several refineries that were denied extensions of exemptions appealed EPA's decisions. In 2015, this Court and the U.S. Court of Appeals for the Eighth Circuit heard these challenges.

On June 2, 2015, this Court delivered its opinion in *Hermes Consol. v. EPA*, 787 F.3d 568 (D.C. Cir. 2015). In *Hermes Consol.*, the Wyoming Refining Company petitioned EPA to extend the temporary exemption it received at the start of the RFS Program. DOE and EPA determined that the refinery's score on the disproportionate index matrix warranted an exemption. However, the agencies found that the refinery's viability index score was below 1.0 and did not warrant an exemption. *Id.* at 574. This Court upheld EPA's use of a viability index to evaluate "disproportionate economic hardship," finding it "based on a permissible construction of the statute." *Id.* at 575 (quoting *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984)). This Court reasoned that EPA's choice to measure "hardship" in terms of a refinery's ability to maintain long-term profitability and competitiveness—*i.e.*, viability—was a choice "well within the agency's discretion." *Id.* at 576. EPA noted that RFS Program compliance costs did not appear to threaten the refinery's profitability and competitiveness given the refinery's decision to make "a substantial discretionary dividend payment" that

could have funded projects to meet the demands of the RFS Program. The Court explained:

The discretionary dividend payment indicated that [Wyoming Refining Company] elected to distribute profits to its owners rather than use profits to prepare for approaching compliance obligations. Allowing small-refineries to perpetuate that manner of self-inflicted hardship would conflict with the terms of the statute, which contemplate a ‘[t]emporary exemption’ for small refineries with an eye toward eventual compliance with the renewable fuels program for all refineries.³¹

Soon after the decision in *Hermes Consol.*, the Eighth Circuit heard a similar challenge in *Lion Oil Co. v. EPA*, 792 F.3d 978 (8th Cir. 2015). The court in *Lion Oil* also upheld DOE and EPA’s decision to use a viability index to measure the impacts of RFS Program compliance on a refinery’s long term ability to maintain profitability and competitiveness:

The relative costs of compliance alone cannot demonstrate economic hardship because all refineries face a direct cost associated with participation in the [RFS] program. Of course, some refineries will face higher costs than others, but whether those costs impose disproportionate economic hardship on a given refinery presents a different question.

Id. at 984 (quoting *Hermes Consol.* at 575).

³¹ *Id.* at 578.

3. Congressional Appropriation Directives Regarding Small Refinery Exemptions

On December 17, 2015, several months after the decisions in *Hermes* and *Lion Oil*, an Explanatory Statement accompanying Congress's Consolidated Appropriations Act for fiscal year 2016 contained language related to DOE's evaluation of small refinery petitions.

According to [DOE's] March 2011 Small Refinery Exemption Study, disproportionate economic hardship must encompass two broad components: a high cost of compliance relative to the industry average disproportionate impacts and an effect sufficient to cause a significant impairment of the refinery operations viability.

If the Secretary [of DOE] finds that either of these two components exists, the Secretary is directed to recommend to the EPA Administrator a 50 percent waiver of RFS requirements for the petitioner.”

The Secretary [of the Department of Energy] is reminded that that the RFS program may impose a disproportionate economic hardship on a small refinery even if the refinery makes enough profit to cover the cost of complying with the program. Small refinery profit does not justify a disproportionate regulatory burden where Congress has explicitly given EPA authority in consultation with the Secretary, to reduce or eliminate this burden.³²

The following year, the U.S. Senate Committee on Appropriations issued Senate Report 114-281, related to an appropriations bill for the Department of the

³² 161 CONG. REC. H10105 (daily ed. Dec. 17, 2015) (Explanatory Statement submitted by Rep. Rogers), 2015 WL 9275558 at *H10105.

Interior and EPA for fiscal year 2017. The Committee issued directives to EPA regarding its issuance of extensions of exemptions to small refineries:

In response to several recent small refinery petitions for extensions of exemptions, EPA determined that compliance with the RFS would have a disproportionate economic impact on a small refinery, but denied hardship relief because the small refinery remained profitable notwithstanding the disproportionate economic impact. This is inconsistent with congressional intent because the statute does not contemplate that a small refinery would only be able to obtain an exemption by showing that the RFS program threatens its viability. Congress explicitly authorized the Agency to grant small refinery hardship relief to ensure that small refineries remain both competitive and profitable. In the intensely competitive transportation fuels market, small entities cannot remain competitive and profitable if they face disproportionate structural or economic metrics such as limitations on access to capital, lack of other business lines, disproportionate production of diesel fuel, or other site specific factors identified in DOE's 2011 Small Refinery Exemption Study prepared for Congress.

When making decisions about small refinery exemptions under the RFS program, [EPA] is directed to follow DOE's recommendations which are to be based on the original 2011 Small Refinery Exemption Study prepared for Congress and the conference report to division D of the Consolidated Appropriations Act of 2016.³³

Importantly, the Congressional Explanatory Statements did not change the language of the RFS Statute or the methodology of DOE's 2011 study, except to clarify that DOE should recommend a 50 percent exemption if it found that

³³ S. Rep. No. 114-281, at 71 (2016), 2016 WL 3353592 at *71. The Explanatory Statement accompanying Consolidated Appropriations Act for fiscal year 2017 incorporated by reference "the directive contained in Senate Report 114-281 related to small refinery relief." 163 CONG. REC. H3884 (daily ed. May 3, 2017)(Explanatory Statement submitted by Rep. Frelinghuysen), 2017 WL 1735608 at *H3884.

compliance with the RFS Program would impose upon a small refinery either a high cost of compliance relative to the industry average *or* an effect sufficient to cause a significant impairment of the refinery operations.

4. Small Refinery Exemptions in Compliance Years 2016-17

In 2017, shortly after Scott Pruitt was appointed as the EPA Administrator by newly elected President Donald Trump, the number of small refineries submitting petitions for extensions of exemptions for compliance year 2016 increased markedly, from 14 the previous year to 20, a year-to-year increase of 50 percent. Though at least a dozen of the petitioners had not received temporary exemptions in the immediately preceding years, they nevertheless petitioned EPA for “extensions” of exemptions. The rate at which EPA granted these petitions also increased dramatically, without public explanation, from 53 percent to 95 percent.³⁴

While EPA at this time did not publish any information about the number of small refinery petitions received or granted, the small refining industry clearly got the message that the odds of receiving an exemption had dramatically increased. In 2018, the number of small refineries seeking exemptions grew again, from 20 to 37, a year-over-year increase of 80 percent. Of those 37 petitions, 29 were granted, zero were rejected, and seven are still pending, an approval rate of 80 percent. In two

³⁴ See EPA Small Refinery Exemption Dashboard, *supra* note 26.

short years, therefore, the number of small refinery exemptions granted by grew over 300 percent, from seven to at least 29.

Compliance Year	Number of Petitions Received	Number of Grants Issued	Number of Denials Issued	Number of Petitions Declared Indelible or Withdrawn	Number of Pending Petitions
2016	20	19	0	0	1
2017	37	29	0	1	7

With the increase in the number of small refinery exemptions came a corresponding increase in the number of RINs that exempt small refineries no longer need. The number of exempted RINs grew from 290 million in compliance year 2015 to 1.46 billion in compliance year 2017, a 400 percent increase.³⁵

Compliance Year	Estimated Volumes of Gasoline and Diesel Exempted (million gallons)	Estimated Renewable Volume Obligations (RVO) Exempted (million RINs)
2013	1,980	190
2014	2,300	210
2015	3,070	290
2016	7,840	790
2017	13,620	1,460

Due to the secrecy surrounding EPA's administration of the small refinery exemptions, ABFA and its members were not immediately aware of EPA's drastic increase in the number of exemptions granted to small refineries. On April 4, 2018,

³⁵ *Id.*

Reuters published a newspaper story that EPA had granted approximately 25 small refinery waivers.³⁶ This article had an immediate impact on the RIN market. The average price of a 2018 D6 Ethanol RIN dropped from \$0.39 the day before the news article was published to \$0.33 the following day, a 15 percent loss. Likewise, the price of a 2018 D4 Biodiesel RIN declined from an average price of \$0.63 on April 3, 2018 to \$0.58 the following day, an eight percent drop.³⁷ RIN prices continued to decline for most of 2018, with the price of D6 and D4 RINs reaching \$0.07 and \$0.38 by November 13, 2018.³⁸

II. EPA Allows Dubious Claims of Confidential Business to Shield its Small Refinery Exemption Decisions from Public, Congressional, and Judicial Scrutiny

Small refineries include information in petitions for exemptions that they claim is confidential business information. When EPA makes a final decision on a small refinery exemption petition, the agency unquestioningly treats all information in the decision document—including information as simple as the name of the company applying for and receiving the lucrative exemption—as confidential. EPA

³⁶ Jarrett Renshaw and Chris Prentice, U.S. Ethanol Groups Bristle as EPA Frees Refiners from Biofuels Law, Reuters (Apr. 4, 2018), available at <https://www.reuters.com/article/us-usa-biofuels-epa-refineries/u-s-ethanol-groups-bristle-as-epa-frees-refiners-from-biofuels-law-idUSKCN1HB2AH> (last visited Dec. 19, 2018).

³⁷ See Oil Price Information Service, Ethanol & Biodiesel Information Service, Volume 15, Issue 15 (Apr. 9, 2018)(Attachment 1 to ABFA's Underlying Decision From Which Petition Arises, Doc. No. 1734253).

³⁸ See Decl. of M. McAdams, Add. 2, pp. 1-6.

maintains that it is bound by 40 C.F.R. §§ 2.204, 2.205, and 2.208 to treat any information claimed to be confidential accordingly until it can evaluate the veracity of that claim.³⁹ In practice, however, EPA makes no effort to review the small refineries' over-inclusive claims of confidentiality. Many of the petitions at issue were submitted in 2016 yet EPA has not made any determinations as to whether the information warrants protection.

This practice allows EPA to issue small refinery exemptions free from oversight or scrutiny from the public, Congress, or the judicial branch. EPA has refused, based on claims of confidentiality, to provide detailed information about its small refinery exemption decisions in response to requests from Congress.⁴⁰ EPA maintains this policy even after a refinery publicly discloses its receipt of a small refinery exemption in public filings to the U.S. Securities and Exchange

³⁹ See EPA Certified Index of Documents Comprising the Administrative Record, Doc. No. 1763506, n. 2.

⁴⁰ Letter from William Wehrum, EPA Assistant Administrator, to Charles Grassley, U.S. Senate (July 12, 2018), Add. 2, p. 21 (“Your letter requests information related to those small refineries granted exemptions in 2016, 2017, and 2018. EPA is unable to provide information that is fully responsive to your request, as we treat both the names of individual petitioners and EPA’s decision on those petitions as Confidential Business Information”)

Commission.⁴¹ EPA also refuses to respond to FOIA requests seeking information about its small refinery exemptions.⁴²

Only in September of 2018, in response to sustained public pressure about the lack of transparency surrounding the RFS Program, did EPA finally publish an online Small Refinery Exemption Dashboard with basic information about the number of small refinery petitions received, granted, and denied.⁴³

III. Procedural Background

ABFA filed its petition for review on May 1, 2018. Doc. No. 1729543. On October 12, 2018, the Court granted Refining & Marketing LLC's motion to intervene. Doc. No. 1755056.

⁴¹ *See, e.g.*, Calumet Specialty Products Partners, L.P. 2017 Form 10-K, p.19 (“We have received small refinery exemptions for our fuel products refineries for the full year 2016 and 2017.”), available at <https://www.sec.gov/Archives/edgar/data/1340122/000134012218000067/clmt-20171231x10k.htm> (last visited Mar. 2, 2019).

⁴² ABFA submitted a FOIA Request (EPA-HQ-2018-007476) to EPA on May 8, 2018 but has not received a response. EPA has refused to respond to at least eight similar requests filed by others. The list of similar requests is provided in ABFA's Underlying Decision From Which Petition Arises, Doc. No. 1734250, p. 7, n. 12.

⁴³ *See* U.S. EPA, EPA Updates RFS Website to Improve Transparency (Sept. 20, 2018), <https://www.epa.gov/newsreleases/epa-updates-rfs-website-improve-transparency> (“For the first time, EPA is providing new information to the public on small refinery exemptions and RIN trading.” *** “We hear concerns about lack of transparency around the issuance of small refinery waivers and we are hopeful these changes will put everyone on a level playing field to receive the information at the same time.”)

On June 29, 2018, ABFA filed a Motion to Compel EPA to Produce the Full Administrative Record and Motion to Stay Briefing on Dispositive Motions until the Full Administrative Record is Produced. Doc. No. 1738444. On July 13, 2018, EPA filed a Motion to Dismiss. Doc. No. 1740614. Following a full briefing by the parties, the Court issued a Per Curium Order on October 11, 2018 referring both motions to the merits panel.

EPA claimed it was restricted from producing copies of its final decision documents in the Certified Index because they contained confidential business information. The Court approved a protective order governing claimed confidential information on January 9, 2019. Doc. No. 1767626. EPA provided ABFA copies of the Certified Index documents on February 1, 2019.

SUMMARY OF ARGUMENT

Congress established the RFS Program in 2005 to incentivize production and use of renewable transportation fuels. Recognizing that compliance might pose challenges to some obligated parties, Congress granted small refineries a multi-year, temporary exemption and thereafter allowed any small refinery to petition EPA to extend its temporary exemption if RFS Program compliance caused disproportionate economic hardship. Starting in May 2017, EPA began to ignore this mandate, providing largess to certain companies who somehow knew to request exemptions.

EPA conducts its review of small refineries' petitions for exemptions behind a curtain of secrecy and refuses to make its final exemption decisions public, even in response to Congressional inquiries or FOIA requests. ABFA has demonstrated that biofuels producers experienced extreme economic hardship as a result of EPA's decision to dismantle the RFS Program. The decision documents in EPA's Certified Index provide a look behind the curtain and reveal that EPA has committed several unlawful and arbitrary and capricious actions in its administration of the RFS Program.

First, EPA is employing a new methodology under which a profitable and competitive small refinery can be deemed to suffer disproportionate economic hardship and receive an exemption due to various structural obstacles. EPA's practice of equating any structural disadvantage with economic hardship reads the word "hardship" out of the CAA. EPA's decision documents, which contain less than a paragraph of refinery-specific analysis to justify each exemption, also fail to articulate a rational connection between the facts found by EPA and its decision.

Second, EPA is unlawfully granting exemptions based on the consideration of factors that are not directly related to a small refinery's compliance with the RFS Program, such operating loss, debts held on behalf of parent companies, and RIN cost without accounting for pass-through recoupment or the sale of exempted RINs.

Third, EPA is unlawfully granting “extensions” of a temporary exemptions to small refineries that were not continuously subject to a temporary exemption in all preceding years or that never received a temporary exemption.

STANDING

ABFA has standing to file this petition on behalf of its members. First, the interests that ABFA seeks to protect through this petition are germane to its fundamental purpose, which is to secure a stable regulatory environment and level playing field for advanced renewable fuels. The EPA actions that ABFA is challenging led to a large increase in the number of small refinery exemptions, which caused RIN prices to precipitously decline and in turn reduced the price that ABFA’s members received from selling RINs after blending renewable fuels into traditional fuels.⁴⁴

Many of ABFA’s members have suffered concrete injuries as a result of the EPA actions being challenged and would have standing to file this petition in their own right. In the face of declining RIN prices, ABFA members experienced negative impact to their revenues, delayed long-term renewable fuel investments, and reduced biofuel blending activities that left underutilized the blending infrastructure in which they had already heavily invested.⁴⁵ Some smaller ABFA

⁴⁴ See Decl. of M. McAdams, Add. 2, pp. 1-6.

⁴⁵ See Decl. of M. Whitney, Add. 2, pp. 7-10, and Decl. of J. Baines, Add. 2, pp. 15-18.

members that produce biofuels were unable to economically produce and market their biofuels in the wake of low RIN prices and have been forced to cease production and lay off workers.⁴⁶

The harm suffered by ABFA's members is redressable by this Court, as a ruling setting aside EPA's final agency actions as unlawful and arbitrary and capricious would return the agency to the methodology that it previously used to evaluate small refinery petitions, which would in turn restore predictability to the RIN market and lower the number of small refinery exemptions granted in any given compliance year.

ABFA and its members are in the zone of interests protected by the CAA, which allows those affected by EPA's actions under the CAA to petition for judicial review. Congress amended the CAA to include the RFS Program to increase domestic sources of energy and to help transition the transportation sector from traditional to alternative fuels. ABFA and its members are on the front lines of this effort, and the CAA's RFS Program was created to facilitate and reward their efforts.

ABFA's standing in this case is similar to the petitioner in *Energy Future Coal. v. EPA*, 793 F.3d 141 (D.C. Cir. 2015), in which this Court found that a coalition of biofuel producers had standing to challenge an EPA final agency action that adversely affected the biofuels market.

⁴⁶ See Decl. of S. Lamb, Add. 2, pp. 11-14.

STANDARD OF REVIEW

The CAA requires the Court to determine whether EPA's actions were arbitrary and capricious, an abuse of discretion, in excess of statutory authority, or otherwise not in accordance with law. *See* 42 U.S.C. §7607(d)(9); *see also Alaska Dep't of Env'tl. Conservation v. EPA*, 540 U.S. 461, 496-97 (2004). The arbitrary and capricious standard requires an agency to examine the relevant factors and articulate a satisfactory explanation for its action. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 43 (1983).

ARGUMENT

I. ABFA's Petition for Review is Properly Before this Court

EPA's Motion to Dismiss, Doc. No. 1740614, argues that ABFA's petition is not properly before this Court because it (1) fails to point to final agency action and (2) should have been filed in a different court. Both arguments are without merit.

A. ABFA's Petition for Review Challenges Discrete Final Agency Actions by EPA

This Court's jurisdiction under Section 307(b)(1) of the CAA is limited to EPA actions that are final. *See Whitman v. American Trucking Ass'n*, 531 U.S. 457, 478 (2001) (finding that the phrase "final action" in CAA Section 307(b)(1) has the same meaning as "final agency action" under the APA, 5 U.S.C. § 704)(*citing Harrison v. PPG Indus.* 446 U.S. 578, 586 (1980)). For an agency action to be final, it must "mark the consummation of the agency's decisionmaking process." *Bennett*

v. Spear, 520 U.S. 154, 177-78 (1997). In other words, EPA must have “rendered its last word on the matter” in question for that decision to be reviewable. *Harrison v. PPG Indus.*, 446 U.S. at 586.

Agency actions do not have to be formally published through notice-and-comment rulemaking to be final. In *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000), this Court ruled that an agency guidance document was final agency action as it “reflect[s] a settled agency position which has legal consequences . . . for companies like those represented by petitioners. . . .” In *Hermes Consol. v. EPA*, 787 F.3d 568, 576-77 (D.C. Cir. 2015), this Court found that a change to EPA’s methodology for evaluating small refinery petitions, explained in a footnote in a letter to a small refinery, was challengeable final agency action. *Id.* at 577.

ABFA’s petition set forth a credible allegation that EPA made fundamental changes to the RFS Program susceptible to legal challenge based on reliable newspaper articles reporting that EPA was granting unprecedentedly high numbers of small refinery exemptions. By the time EPA filed its motion to dismiss claiming that no final action had occurred, ABFA was able to cite an EPA letter admitting that the number of small refinery exemptions had radically increased.⁴⁷

⁴⁷ See ABFA Resp. in Opp., Doc. No. 1744273, attaching July 12, 2018 EPA letter, *supra* note 40.

EPA's final decision documents on small refinery petitions, provided in EPA's Certified Index, clearly show that EPA changed its methodology for evaluating petitions for small refinery exemptions on May 4, 2017. Similar to the change in scoring methodology that this Court determined was challengeable final agency action in *Hermes Consol.*, 787 F.3d at 576-77 (D.C. Cir. 2015), EPA buried its fundamental change in a footnote.

As explained above, DOE's 2011 Small Refinery Exemption Study determined that a small refinery will suffer disproportionate economic hardship as a result of complying with the RFS Program if its average score exceeds 1.0 for the combined scoring matrix for Disproportionate Structural Impact Metrics-Disproportionate Economic Impact Metrics **and** exceeds 1.0 for the scoring matrix for Viability Metrics. An Explanatory Statement accompanying the Consolidated Appropriations Act for fiscal year 2016 directed DOE to recommend a 50 percent waiver for a small refinery whose score exceeds 1.0 on either of the two matrices.⁴⁸ DOE thus began to recommend that a small refinery receive a 50 percent exemption when it scored above 1.0 on the combined Disproportionate Structural Impact/Disproportionate Economic Impact matrix but scored below 1.0 on the Viability matrix. Congress directed EPA to follow DOE's recommendations.⁴⁹

⁴⁸ 161 CONG. REC. H10105 (daily ed. Dec. 17, 2015) (Explanatory Statement submitted by Rep. Rogers), 2015 WL 9275558 at *H10105.

⁴⁹ S. Rep. No. 114-281, at 71 (2016), 2016 WL 3353592 at *71.

On May 4, 2017, however, EPA issued a final decision on a small refinery’s petition for an extension of its temporary exemption in which the agency announced a new policy under which it would disregard DOE’s Viability matrix score and award a 100 percent exemption to a refinery that scored above 1.0 on the combined Disproportionate Structural Impact/Disproportionate Economic Impact matrix. In a footnote, EPA explained its change in methodology:

In prior decisions, EPA considered that a small refinery could not show disproportionate economic hardship without showing an effect on “viability,” but ***we are changing our approach***. While a showing of significant impairment of refinery operations may help establish disproportionate economic hardship, compliance with RFS obligations may impose a disproportionate economic hardship when it is disproportionately difficult for a refinery to comply with its RFS obligations—even if the refinery’s operations are not significantly impaired.⁵⁰

While this was a sweeping change in methodology that would eliminate hundreds of millions of dollars of compliance obligations under the RFS Program—allowing small refiners to keep money that they would have previously paid to ABFA’s members to buy renewable fuel and RINs—it was made surreptitiously. EPA did not announce this change through notice-and-comment rulemaking or a press release, but tucked it into footnote 10 of an informal adjudication decision document sent to only one refinery and shielded from public view under the dubious claim that it contained confidential business information.

⁵⁰ *Ergon-West Virginia, Inc. v. EPA*, 896 F.3d 600, 614 (4th Cir. 2018) (emphasis added).

Despite EPA taking no official steps to publicize its change, word of EPA's favorable new methodology clearly spread among small refineries—as if delivered from a soundproof phone booth⁵¹—as evidenced by the fact that dozens of small refineries began to submit petitions for extensions of exemptions even though they had not pursued exemptions in prior years. It cannot possibly be a coincidence that so many companies suddenly sought this economic windfall from EPA.

EPA has suggested that any changes to its methodology were done in the context of case-by-case informal rulemakings and do not constitute agency policy or final agency action. Nothing could be further from the truth. On May 4, 2017, the day EPA began to implement its change in methodology, it issued full exemptions to five small refineries over DOE's recommendations that all should receive either no exemption or at most a 50 percent exemption because the refineries scored less than 1.0 on the Viability matrix.⁵² For the next two years, EPA unfailingly applied its new policy and issued 33 full exemptions to small refineries for which DOE recommended only a 50 percent exemption based on Viability matrix scores below

⁵¹ U.S. Government Accountability Office, U.S. Environmental Protection Agency—Installation of Soundproof Privacy Booth (Apr. 16, 2018) available at <https://www.gao.gov/assets/700/691272.pdf> (GAO Report finding that EPA violated Financial Services and General Government Appropriations Act, 2017, by spending \$43,000 to install a soundproof privacy booth in the office of former EPA Administrator Scott Pruitt).

⁵² R-56 (JA266), R-58 (JA300-01), R-59 (JA320), R-60 (JA339), and R-61 (JA357).

1.0 (and often 0.0).⁵³ After May 4, 2017, EPA always ignored DOE's recommendations for 50 percent waivers and issued full exemptions.

Further undercutting EPA's claims that its changes in methodology were simply isolated case-by-case decisions, EPA referred to its May 4, 2017 change in methodology in subsequent decision documents. EPA made its next wave of exemption decisions on November 1, 2017, when it granted three full exemptions over DOE's recommendations for 50 percent waivers. In those decisions, EPA discussed the opinion issued on August 15, 2017 in *Sinclair Wyo. Ref. Co. v. EPA*, 867 F.3d 1211 (10th Cir. 2017). EPA made clear that the decision in *Sinclair* had nothing to do with its recent change in methodology, stating "[h]owever, prior to this ruling, EPA **had already changed its approach** for the 2016 small refinery petitions issued **in May 2017**."⁵⁴ Thereafter, every small refinery exemption decision document issued by EPA for compliance year 2016 stated "[f]or the purpose of implementing CAA Section 211(o)(9) for 2016 small refinery exemption decisions, **EPA has determined** that DEH [Disproportionate economic hardship] can exist on the basis of adverse structural conditions alone."⁵⁵ All of EPA's final decision documents for compliance year 2017 similarly state: "[f]or the purpose of

⁵³ The following final decision documents in EPA's Certified Index show this result: R-56, R-58 to R-60, R-62 to R-64, R-66 to R-70, R-72 to R-76, R-80, R-81, R-83, R-85 to R-92, R-94 to R-98.

⁵⁴ R-62 (JA362), R-63 (JA368), and R-64 (JA374).

⁵⁵ See, e.g., R-66 (JA379) and R-67 (JA384).

implementing CAA Section 211(o)(9) for 2017 small refinery exemption decisions, EPA has determined that DEH [Disproportionate economic hardship] can exist on the basis of adverse structural conditions alone.”⁵⁶

It is clear, therefore, that EPA changed its methodology on May 4, 2017 and continues to implement it. EPA’s change to the methodology used to determine “disproportionate economic hardship” is comparable to EPA’s change in scoring methodology in *Hermes Consol.* or EPA’s guidance document in *Appalachian Power*, which this Court found were reviewable final agency actions.

B. This Circuit is the Proper Venue for ABFA’s Challenge to EPA’s Nationally Applicable Final Agency Actions

CAA Section 307(b)(1) provides that “[a] petition for review of . . . any . . . nationally applicable . . . final action taken, by the Administrator . . . may be filed only in the United States Court of Appeals for the District of Columbia.” In passing this section of the CAA, Congress sought to have this Court review “matters on which national uniformity is desirable” in order to take advantage of this Court’s “administrative law expertise”⁵⁷

⁵⁶ See, e.g., R-71 (JA405) and R-98 (JA512).

⁵⁷ *Texas v. EPA*, No. 10-60961, 2011 WL 710598 at *4 (5th Cir. Feb. 24, 2011) (quoting Admin. Conference of the U.S., Recommendations on Judicial Review Under the Clean Air Act, 41 Fed. Reg. 56767, 56769 (Dec. 30, 1976) (Comments of G. William Frick)).

To determine whether a final agency action is nationally applicable, Courts “need look only to the face of the rulemaking, rather than to its practical effects.” *Dalton Trucking, Inc. v. EPA*, 808 F.3d 875, 881 (D.C. Cir. 2015). Even when a nationwide rule requires a case-by-case determination to apply to a particular region, state, or facility, the rule is nevertheless nationally applicable if the same standards are applied across multiple geographic regions. *See, e.g., ATK Launch Sys., Inc. v. EPA*, 651 F.3d 1194, 1197 (10th Cir. 2011) and *W. Va. Chamber of Commerce v. Browner*, No. 98-1013, 1998 WL 827315 at *6-7 (4th Cir. Dec. 1, 1998).

In *ATK Launch Sys.*, 651 F.3d 1194, 1197-98 (10th Cir. 2011), ATK challenged in the Tenth Circuit an EPA rule that (1) explained the agency’s methodology for determining compliance with a CAA national air quality standard; and (2) designated dozens of regions across the country as noncompliant with the standard. ATK alleged that EPA’s application of its nationwide CAA standard was arbitrary and capricious because it produced inconsistent outcomes in different regions of the country. *Id.* at 1199. After EPA filed a motion to transfer the petition to the D.C. Circuit, ATK argued that its challenge was correctly before the Tenth Circuit because “EPA’s case-by-case consideration of areas and boundaries transforms a national standard to a regional or local rule.” *Id.* at 1198. The Tenth Circuit disagreed, finding that even though the final rule contained local nonattainment decisions, it was not a “mere amalgamation of numerous local actions

into a single rule” but rather “constitutes [EPA’s] national interpretation of Clean Air Act mandates, and any challenge thereto belongs in the D.C. Circuit.” *Id.* at 1200.

In *W. Va. Chamber of Commerce v. Browner*, 1998 WL 827315 at *7 (4th Cir. 1998), a petitioner challenged an EPA rule that set baseline standards for state implementation plans under the CAA and made determinations regarding which states failed to meet the new standards. The petitioner argued that EPA’s rule was “regional or local because it is nothing more than numerous separate EPA actions on state-specific implementation plans, each based upon local factors and conditions.” *Id.* at *6. The court rejected that argument, finding that “the nationwide scope and interdependent nature of the problem, the large number of states, spanning most of the country, being regulated, the common core of knowledge and analysis involved in formulating the rule . . . all combine to make this a nationally applicable rule.” *Id.* at *7.

Here, EPA takes the position that “to obtain review of EPA’s approach to deciding RFS small refinery hardship exemptions, Petitioner must seek review of those exemptions in the appropriate circuit(s).” Doc. No. 1740614 at 20. This would mean that EPA’s sudden change in methodology that it used to grant exemptions to 29 refineries across the nation for compliance year 2017 could only be challenged

through multiple petitions filed in United States Courts Appeals across the country.⁵⁸ This would waste judicial resources and potentially produce conflicting results, an outcome that would undermine the Congressional intent of requiring challenges to nationally applicable agency actions to be brought exclusively in the D.C. Circuit.

EPA's current position is the polar opposite of the one it took in *ATK Launch Sys.* and *W. Va. Chamber of Commerce*. In those cases, EPA rightfully argued that challenges in individual circuit courts are inappropriate when the rule being challenged is consistently applied across the country. Since ABFA is challenging the nationally applicable methods by which EPA evaluates all small refinery petitions, rather than the agency's decisions on individual small refinery petitions, venue in the D.C. Circuit is proper.

II. EPA's Change to the Methodology Used to Determine Disproportionate Economic Hardship was Arbitrary and Capricious and Not in Accordance with Law

Since the completion of DOE's 2011 Study, DOE and EPA have evaluated whether a small refinery is experiencing or will experience disproportionate economic hardship as a result of the RFS Program by scoring the small refinery on both an index that measures disproportionate structural and economic impact metrics

⁵⁸ EPA's position is hard to defend given that in past decision documents EPA explicitly stated that "[t]his decision is a final agency action of nationwide scope and effect for purposes of [§7607(b)(1)]." *Lion Oil Co. v. EPA*, 792 F.3d 978, 981 (8th Cir. 2015).

and an index that measures viability metrics. This Court upheld that approach in *Hermes Consol.*, 787 F.3d at 576 (D.C. Cir. 2015). While Congress later used appropriations bills to direct DOE to recommend a 50 percent exemption if a small refinery scored above a 1.0 on either index,⁵⁹ Congress also directed DOE to continue to evaluate small refinery petitions using the 2011 Study and directed EPA to follow DOE's recommendations.⁶⁰

EPA blatantly disregarded DOE's methodology, Congressional directives, and its own historic practice on May 4, 2017, when it unveiled a policy under which a small refinery can be found to suffer disproportionate economic hardship on the basis of adverse structural conditions alone without evidence that compliance with the RFS Program is adversely affecting the economic viability of a small refinery so that it is no longer profitable or competitive.

A. EPA Provided No Explanation for its Change in Methodology

EPA has never attempted to explain its change to its methodology for determining disproportionate economic hardship.⁶¹ EPA's rationale in its decision

⁵⁹ 161 CONG. REC. H10105 (daily ed. Dec. 17, 2015) (Explanatory Statement submitted by Rep. Rogers), 2015 WL 9275558 at *H10105.

⁶⁰ S. Rep. No. 114-281, at 71 (2016), 2016 WL 3353592 at *71.

⁶¹ Rather than stand behind its new methodology, EPA's strategy in this litigation was to deny that a change took place while seeking to dismiss ABFA's petition before turning over final decision documents that explicitly revealed the change.

documents is limited to the following boilerplate that appears in all decisions since May 4, 2017:

EPA has determined that DEH [disproportionate economic hardship] can exist on the basis of adverse structural conditions alone. A difficult year may exacerbate economic problems for small refineries that face disproportionate impacts, resulting in tangible effects including diminished refining margins, reduced profitability, cash flow limitations that can hinder its ability to acquire renewable fuel credits (Renewable Identification Numbers, or RINs) for compliance, and the potential to impair refinery operations. In addition, small refineries sometimes lack access to capital or credit that can also be necessary to achieve compliance.

In its industry-wide analysis, DOE has found that poor access to capital and credit, lack of other business lines, and high diesel production compared to the industry average can suggest a disproportionate structural impact. Poor refining margins, limited ability to blend ethanol, and market competition can suggest a disproportionate economic impact.⁶²

While an agency can change its policies and methodology, it must justify its final agency actions, especially actions that represent clear reversals of prior agency policies. *Sierra Club v. Salazar*, 177 F.Supp.3d 512 (D.C. Cir. 2016) (“One of the core tenets of reasoned decision-making is that ‘an agency when changing its course is obligated to supply a reasoned analysis for the change.’”)(quoting *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 42). These two paragraphs hardly justify a sweeping change in methodology resulting in dozens of small refinery exemptions worth hundreds of millions of dollars.

⁶² This language appears in all final decision documents issued by EPA on or after May 4, 2017.

B. EPA’s New Methodology Unlawfully Reads the Word “Hardship” Out of the Clean Air Act

The CAA restricts EPA’s authority to grant small refinery exemptions to situations in which compliance with the RFS Program would impose a disproportionate economic hardship on small refineries. EPA has provided no legal justification regarding why a small refinery facing structural obstacles compared to larger refineries, yet scoring a 0.0 on DOE’s Viability Index, is suffering “economic hardship.”

DOE’s Viability Index measures “the ability of the refiners to remain competitive and profitable,” which “requires sufficient profits to make investments in the refinery to remain competitive.”⁶³ Of the 48 EPA decision documents for compliance years 2016 and 2017, EPA granted exemptions to at least 24 small refineries that DOE gave a Viability Index score of 0.0, indicating that RFS Program compliance costs have no impact on the small refinery’s ability to stay competitive and profitable.⁶⁴

EPA’s insistence that any structural disadvantage of a refinery amounts to disproportionate economic hardship warranting a full exemption from the mandates of the RFS Program is an unlawful attempt to read the word “hardship” out of the

⁶³ DOE Small Refinery Exemption Study, R-108 at 36 (JA46).

⁶⁴ The following final decision documents in EPA’s Certified Index show this result: R-56, R-58 to R-61, R-64, R-66 to R-69, R-72 to R-75, R-81, R-83, R-85, R-88, R-90, R-91, R-94, R-95, R-97, R-98.

CAA. A small refinery that remains profitable and competitive despite complying with the RFS Program can hardly be said to be suffering “hardship.”

III. EPA’s Sparse Analysis of “Other Economic Factors” Fails to Provide a Cogent Justification for its Small Refinery Exemption Decisions

The final decision documents issued after May 4, 2017 rely on EPA’s statutory authority to consider “other economic factors” to justify its new policy of looking beyond DOE’s recommendations and awarding full exemptions to small refineries that remain profitable and competitive.

EPA’s analysis extends beyond the metrics DOE applies in assessing potential DEH [disproportionate economic hardship]. EPA considers all of the information submitted by a petitioner when it considers “other economic factors” in evaluating a small refinery petition. For example, EPA considers the information submitted by the petitioner that documents or explains relevant economic conditions or business decisions by the petitioner. EPA may also consider other publicly available information regarding the petitioner that informs EPA’s evaluation regarding how “other economic factors” may cause a small refinery to experience DEH [disproportionate economic hardship] if required to comply with its RFS obligations.⁶⁵

While EPA has the statutory authority to consider “other economic factors,” since May 4, 2017 the agency has treated this power as a license to issue decisions that differ radically from DOE’s recommendations with little explanation. Prior to EPA’s change of methodology on May 4, 2017, its decision documents routinely exceeded 20 pages in length and contained a detailed summary of DOE’s analysis

⁶⁵ See, e.g., R-62 (JA364) and R-97 (JA509).

of each small refinery seeking an exemption followed by several pages of independent analysis of the small refinery's hardship petition.⁶⁶ After May 4, 2017, however, most of EPA's decision documents are only five pages and after setting aside boilerplate language contain only a short paragraph—often a single sentence—justifying a full exemption, over DOE's recommendation, to small refineries that are profitable and competitive.⁶⁷

The “other economic factors” that EPA uses to justify exceeding DOE's recommendations are often part of DOE's evaluation. For example, EPA issued multiple decision documents in which it awarded a full exemption over DOE's recommendation because the small refineries produced a large percentage of diesel, which can be more difficult to blend with renewable fuel.⁶⁸ A refinery's “percentage of diesel production” is not an “other economic factor” that EPA can use to justify deviating from DOE's recommendations, however, because DOE evaluates each refinery's diesel production in metric 1.d of its Disproportionate Structural Impact Matrix.

While the CAA provides EPA with discretion to evaluate small refinery petitions and make final determinations of disproportionate economic hardship, its

⁶⁶ See, e.g., R-50 (JA141-JA161), R-52 (JA183-JA204), and R-54 (JA205-JA226).

⁶⁷ See, e.g., R-95 (JA496-JA500), R-96 (JA501-JA505), and R-97 (JA506-JA510).

⁶⁸ See, e.g., R-72 (JA413), R-73 (JA417-JA418), R-74 (JA422-JA423), and R-95 (JA499-JA500).

power is not unlimited. EPA is bound by the APA to “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choices made.’” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43 (1983) (quoting *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 168 (1962)). For an agency’s evaluation of information within its area of expertise to receive deference “‘an agency must cogently explain why it has exercised its discretion in a given manner’ and that explanation must be ‘sufficient to enable us to conclude that the [agency’s action] was the product of reasoned decision-making.’” *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1481, (D.C. Cir. 1995)(quoting *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 52). EPA’s decision documents after May 4, 2017 universally fall short of this standard and are therefore arbitrary and capricious.

IV. EPA Arbitrarily Awarded Small Refinery Exemptions Solely on a Refinery’s Operating Losses and the Cost of RINs

In EPA’s final decision documents, the agency’s nominal evaluation of “other economic factors” often relied heavily on a refinery’s operating losses regardless of whether those losses were related to compliance with the RFS Program. EPA also heavily weighed the amount of money that a small refinery spent or would likely spend to purchase RINs to meet its RFS Program obligations while simultaneously failing to account for money the exempted refinery would generate from its inevitable sale of unnecessary RINs. For example, EPA awarded a full exemption to

a small refinery based on its cursory consideration of “other economic factors” that included the following analysis:

The petition stated that HFWCR [HollyFrontier Refining and Marketing, LLC] was limited to an effective renewable fuel blending rate of 4.8%, compared to an overall renewable volume obligation of 10.1%. HFWCR stated in its petition that this led to a substantial deficit in RINs, which it says were purchased on the open market at an extraordinary cost for a refinery the size of Woods Cross. In 2016, HFWCR experienced an operating loss of \$24.5 million, including a cost of approximately \$17.6 million to purchase RINs for compliance.⁶⁹

EPA’s analysis is fatally flawed for three reasons.

First, EPA’s decision treats a refinery’s purchase of RINs as a sunk cost that the refinery cannot recoup. This conclusion conflicts with EPA’s own analysis, provided in numerous final exemption decisions, that RIN cost does not cause disproportionate economic hardship because it is passed through to wholesale and retail fuel buyers:

EPA notes that after further review, contrary to statements in this paragraph from the DOE Study, it has been found that a refinery does not experience disproportionate economic hardship simply because it may need to purchase a significant percentage of its RINs for compliance from other parties, even though RIN prices have increased since the DOE study, because the RIN prices lead to higher sales prices obtained for the refineries’ blend stock, resulting in no net cost of compliance for the refinery.⁷⁰

⁶⁹ R-64 at 5 (JA376).

⁷⁰ R-51 at 6, n.5 (JA167) to R-61 at 6, n.5 (JA167-JA347)(citing R-105, Dallas Burkholder, “A Preliminary Assessment of RIN Market Dynamics, RIN Prices, and Their Effects” (May 14, 2015)).

Assistant EPA Administrator William Wehrum, who signed EPA’s final decision documents, reiterated this conclusion in a letter to the U.S. Senate: “All obligated parties . . . are generally able to recover the cost of the RINs they need for compliance with the RFS obligations through the cost of the gasoline and diesel fuel they produce.”⁷¹ Therefore, EPA’s blind acceptance of the refinery’s claim that \$17.6 million of its losses were directly attributable to the purchase of RINs is inconsistent with EPA’s own findings. While an agency is free to change its policy, it must “supply a reasoned analysis for the change” to demonstrate reasoned decision-making. *Sierra Club v. Salazar*, 177 F.Supp.3d 512, 532-33 (D.C. Cir. 2016).

Second, EPA’s disproportionate economic hardship analysis failed to factor in the financial windfall that the small refinery would receive from the inevitable sale of the RINs that it separated by blending renewable fuels into traditional fuels. EPA has determined that small refineries that separate RINs by blending renewable fuels into traditional fuels but nevertheless receive an exemption have a competitive advantage over other refineries.

As the market for renewable fuels matures, obligated parties have developed a much wider suite of physical and contractual arrangements to meet their RFS mandates. In general, small refineries with an RFS exemption have a competitive advantage over the others. This advantage can be enhanced in situations where an exempt party separates some attached RINs through blending renewable fuels, and sells those RINs to improve profitability. A firm’s competitive

⁷¹ Letter from William L. Wehrum, EPA Assistant Administrator, to Charles Grassley, U.S. Senate (Apr. 9, 2018), Add. 2, p. 19.

advantage during an exemption period, and any profits from RIN sales during an exemption period, could lead to lower scores in subsequent evaluations of disproportionate economic impact.⁷²

Here, the refinery's ability to blend its traditional fuels with 4.8 percent of renewable fuels allows it to separate RINs for its own use. The refinery's obligation under the RFS Program is a renewable fuel blend rate of 10.1 percent. The refinery claimed that it spent \$17.6 million to purchase RINs from third parties to provide the remaining 5.3 percent of renewable fuels that it was unable to blend. Upon receiving a full exemption from its blending obligations, however, a savvy refinery would sell both the RINs it separated from its efforts to blend 4.8 percent renewable fuel into traditional fuel and the \$17.6 million of RINs purchased from the market for the remaining 5.3 percent of its prior RFS obligation. Together, this would generate approximately \$33.5 million, turning the refinery's 2016 operating loss of \$24.5 million into a healthy profit of \$7.5 million. EPA's small refinery exemption, therefore, went beyond offsetting the refinery's costs from the RFS Program by allowing the refinery to profit from the RFS Program.

Third, EPA's analysis of "other economic factors" often arbitrarily and capriciously considers the annual operating losses at small refineries even though a large percentage of those operating losses are not attributable to compliance with the RFS Program. The purpose of the CAA's small refinery exemption is not to ensure

⁷² See R-50 at 7, n. 8 (JA147) through R-61 at 7, n.8 (JA348).

that all small refineries make an annual profit, but to protect small refineries from disproportionate economic hardship caused by compliance with the RFS Program. Refining is a complex business and there are countless ways that a small refinery can lose money unrelated to compliance with the RFS Program. The list of refineries in the United States that closed from 1990 to 2018 shows that closures of refineries of all sizes were occurring well before the start of the RFS Program.⁷³

Analyzing the economics and balance sheets of unique small refineries across the country to determine which are suffering disproportionate economic hardship as a result of the RFS Program is admittedly a complex task. Yet, EPA's decision to reduce these complex decisions, each worth tens of millions of millions of dollars,⁷⁴ to five page documents largely filled with boilerplate language and only a few sentences of cursory refinery-specific analysis that show the agency gave great weight to considerations that should not have been considered is the essence of an arbitrary and capricious agency action that is entitled to no deference. *Motor Vehicle*

⁷³ U.S. Energy Information Administration, Refineries Permanently Shutdown by PAD District Between January 1, 1990 and January 1, 2018, available at <https://www.eia.gov/petroleum/refinerycapacity/table13.pdf> (last visited Feb. 28, 2019).

⁷⁴ Public companies receiving exemptions trumpeted their windfalls in financial disclosures. See Jarrett Renshaw, U.S. Refiners Reap Big Rewards from EPA Biofuel Waivers, Reuters (May 8, 2018), <https://www.reuters.com/article/us-usa-biofuels-savings/u-s-refiners-reap-big-rewards-from-epa-biofuel-waivers-idUSKBN1I91ZG> (documenting claims of cost savings by Andeavor (\$100 million), CVR Refining (\$120 million), Delek U.S. Holdings (\$79 million), and HollyFrontier (\$71 million)).

Mfrs. Ass'n, 463 U.S. at 43 (agency action is arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency”)

V. EPA Unlawfully Considered the Debts of a Small Refinery’s Parent Companies when Evaluating Disproportionate Economic Hardship

When creating the RFS Program, Congress defined a “small refinery” at 42 U.S.C. § 7545(o)(1)(K) as “a refinery for which the average aggregate daily crude oil throughput for a calendar year . . . does not exceed 75,000 barrels.” For purposes of administering the small refinery exemption, therefore, EPA must look to the small refinery level rather than to the refinery’s corporate ownership.

In at least one instance, however, EPA considered during its analysis of “other economic factors” the fact that a small refinery is a co-guarantor of the debts of its corporate parents and is unable to incur new debts due to the poor financial condition of its corporate parent.

CMRC [Calumet Montana Refining, LLC] stated that CMR [Great Falls, Montana refinery] has no credit rating, and that CMR is a co-guarantor of several of its parents debt issues. CMRC also stated that due to the poor financial condition of CMR’s parent, neither CMR nor its parent may incur new debt to purchase RINs. CMRC also stated that CMR expects to produce 8% diesel in its transportation fuel mix in 2017, but that market demands restrict CMR’s biodiesel blending opportunities. CMRC reported a net operating loss of \$8.4 million for CMR for the eight months ended August 31, 2017.⁷⁵

⁷⁵ R-76 at 4-5 (JA432-JA433).

These challenges are unrelated to the small refinery's obligations under the RFS Program and therefore should not have been a factor in EPA's decision to disregard DOE's recommendation and grant a full exemption. If the debts of a small refinery's corporate parent can justify a finding of disproportionate economic hardship, then the profits of a small refinery's corporate parent should likewise be able to reverse a hardship finding. For example, EPA granted full exemptions for compliance year 2017 to small refineries owned by Exxon Mobil (2017 earnings of \$19.7 billion)⁷⁶ and Chevron (2017 earnings of \$9.2 billion).⁷⁷ To allow large corporate parents to qualify for a small refinery exemption by siphoning assets from a small refinery in its corporate family or by burdening a small refinery with its debts is similar to the voluntary dividend that this Court found in *Hermes Consol.* to be a self-inflicted harm that did not qualify as disproportionate economic hardship. For EPA to grant full exemptions based on the information above is unlawful and arbitrary and capricious.

⁷⁶ Exxon Mobil 2017 Summary Annual Report, <https://corporate.exxonmobil.com/-/media/Global/Files/investor-relations/annual-meeting-materials/annual-report-summaries/2017-Summary-Annual-Report.pdf> (last visited Mar. 4, 2019).

⁷⁷ Press Release, Chevron, Chevron Reports Fourth Quarter Earnings of \$3.1 Billion, Annual Earnings of \$9.2 Billion (Feb. 2018), <https://www.chevron.com/stories/chevron-reports-fourth-quarter-earnings-of-3-1-billion> (last visited Mar. 4, 2019).

VI. EPA is Unlawfully Awarding “Extensions” of Temporary Exemptions to Small Refineries Not Previously Exempt

As explained above, Congress created the mechanism whereby small refineries suffering disproportionate economic hardship as a result of compliance with the RFS Program can receive a “temporary exemption” from compliance. This Court explained in *Hermes Consol.*, 787 F.3d at 578, that the terms of the RFS statute “contemplate a ‘[t]emporary exemption’ for small refineries with an eye toward eventual compliance with the renewable fuels program for all refineries.” EPA confirmed this reading in a final decision document:

While Congress eased that burden [of RFS Program compliance] by granting Hunt and other qualifying small refineries *temporary* exemptions from their compliance obligations, the last of those exemptions expired on January 1, 2011. Any further exemption depends on Hunt’s ability to demonstrate ‘disproportionate economic hardship.’ Thus, in 2010, the statutory presumption was that in 2011 and future years, Hunt would shoulder its share of responsibility for the compliance burden borne by obligated parties under the RFS program, unless it could show ‘disproportionate economic hardship.’⁷⁸

Until EPA’s change in methodology on May 4, 2017, the number of exemptions granted by EPA reflected Congress’s goal that the number of small refineries receiving exemptions should decline over time. At the outset of the RFS Program, Congress granted all small refineries a temporary blanket exemption

⁷⁸ R-55 at 23 (JA250).

through 2010.⁷⁹ This Court explained in *Hermes Consol.*, 787 F.3d at 572-73 that this initial “blanket exemption gave small refineries time to develop compliance strategies and increase blending capacity.” However, EPA made clear that at the end of the blanket exemption that “small refineries would be required to meet the same renewable fuel obligations as all other refineries, unless their exemption is extended”⁸⁰ Following DOE’s 2011 study, 24 small refineries were given an extension of their temporary blanket exemption for another two years through compliance year 2012.⁸¹

For compliance year 2013 and beyond, Congress provided that “[a] small refinery may at any time petition the Administrator [of EPA] for an extension of the exemption under subparagraph (A) [temporary exemptions] for the reason of disproportionate economic hardship.”⁸² EPA regulations similarly provides that “[a] refiner may petition the Administrator for an extension of its small refinery exemption, based on disproportionate economic hardship, at any time.”⁸³ EPA’s Small Refinery Dashboard shows that the number of small refineries receiving an

⁷⁹ 42 U.S.C. § 7545(o)(9)(A)(i).

⁸⁰ U.S. EPA, Renewable Fuel Standard Program, 72 Fed. Reg. 23900, 23924 (May 1, 2007).

⁸¹ See EPA Small Refinery Exemption Dashboard, *supra* note 26.

⁸² 42 U.S.C. § 7545(o)(9)(B)(i).

⁸³ 40 C.F.R. § 80.1441(e)(2) (emphasis added).

extension of their temporary exemptions dropped to eight in 2013 and 2014 and further declined to seven in 2015.

Neither the RFS statute, EPA's implementing regulations, nor DOE's 2011 Study contemplated "disproportionate economic hardship" as an ephemeral state that a small refinery would pass into and out of from one year to the next. DOE's 2011 Study contemplated that a small refinery would suffer disproportionate economic hardship only if it experienced a high cost of RFS Program compliance relative to the industry average severe enough to "cause a significant impairment of the refinery operations."⁸⁴ A small refinery receiving a temporary financial advantage from an exemption is expected to make facility investments necessary to remain economically competitive and to come into compliance.⁸⁵ In fact, a petition must provide "the date the refiner anticipates that compliance with the requirements can reasonably be achieved at the small refinery."⁸⁶

As word of EPA's change to the methodology used to determine disproportionate economic hardship spread throughout the small refinery industry, the number of petitions for exemptions increased dramatically. Nineteen small refineries received extensions of temporary exemptions for compliance year 2016. Given that only seven refineries had received an exemption in 2015, at least 13 of

⁸⁴ DOE Small Refinery Exemption Study, R-108 at 3 (JA13).

⁸⁵ R-108 at 23 (JA33).

⁸⁶ 40 C.F.R. § 80.1441(e)(2)(i).

the 2016 petitioners were seeking an “extension” of a temporary exemption they had not received for several years. For compliance year 2017, 37 small refineries received “extensions” of exemptions, even though at least 30 of these small refineries had not received a temporary hardship exemption in 2015.

EPA appears to justify its policy of awarding extensions of temporary exemptions to refineries that have not been subject to a temporary exemption for several years by pointing to statutory language that permits a small refinery to petition for an extension of its exemption “at any time.”⁸⁷ EPA’s interpretation allows a small refinery that received a temporary blanket exemption through 2010 but did not receive a two year extension of the temporary exemption from DOE, and then neither petitioned for nor received an exemption for 2013, 2014, or 2015, to nevertheless petition for and receive in 2016 an “extension” of the temporary exemption that it last received in 2010.⁸⁸ If EPA’s interpretation is correct, then Congress would have simply given the agency the authority to issue exemptions to small refineries. Instead, Congress purposefully limited EPA’s authority to that of granting “extensions of exemptions.” When interpreting a statute, courts have a duty to follow “the cardinal principle of statutory construction” and “give effect, if

⁸⁷ 42 U.S.C. § 7545(o)(9)(B)(i).

⁸⁸ See R-56 at 7, n.11 (JA260) (EPA decision document awarding a small refinery in 2017 an “extension” of the temporary exemption it last received in 2010.)

possible, to every clause and word of a statute” *Williams v. Taylor*, 529 U.S. 362, 364 (2000). Here, the concept of an “extension” vanishes.

EPA’s interpretation is further strained by its decision to grant “extensions” of exemptions to small refineries that never received an initial temporary exemption. In 2015, over a decade after Congress created the RFS Program, Andeavor opened a small refinery in Dickinson, North Dakota. The Dickinson refinery never received the blanket exemption that Congress gave all small refineries through compliance year 2010. Nevertheless, Andeavor petitioned EPA for an extension of the small refinery exemption for compliance years 2016 and 2017.⁸⁹ EPA determined that the Dickinson Refinery was eligible for an extension of an exemption:

EPA notes that the Dickinson Refinery did not receive the initial, statutory small refinery exemption. CAA 211(o)(9)(A)(i); 40 CFR 80.1441(a)(1). Nonetheless, EPA believes the refinery is eligible to petition for hardship relief today. A refinery may petition for such hardship relief “at any time,” CAA 211(o)(9)(B)(i); 40 CFR 80.1441(e)(2), so long as the refinery is a qualifying small refinery. To “qualify for a [sic] extension of its small refinery exemption,” a refinery’s average aggregate daily crude oil throughput must not exceed 75,000 barrels per day “for the most recent full calendar year prior to seeking an extension as well as for the year for which an exemption is sought.” 40 CFR 80.1441(e)(2)(iii). EPA finds that the Dickinson Refinery qualifies to petition for hardship relief because its crude oil throughput did not exceed 75,000 barrels per day in 2016 (the year for which it seeks an extension) as well as for 2015 (the prior year).⁹⁰

⁸⁹ R-69 (JA393) and R-90 (JA474).

⁹⁰ R-69 at 2 (JA394). EPA offered an identical analysis in R-90 at 2 (JA475) to award the Dickinson Refinery an exemption for compliance year 2017.

Similarly, EPA awarded an “extension” of an exemption to a small refinery that never received a blanket small refinery exemption from Congress because it previously operated above the threshold of 75,000 barrels per day that Congress set to define a small refinery. When the refinery’s production dropped below this volume it petitioned EPA to “extend” a temporary exemption that it never possessed. EPA granted this request based on the following rationale:

Previously, EPA regarded as eligible for hardship relief only those refineries that received the initial statutory exemption. Such refineries qualified as small refineries in either 2004 or 2006. See 40 CFR 80.1441(a)(1), 80.1141(a)(1); see also 75 FR 14866 (defining “small refinery” based on crude throughput in 2006). EPA’s current interpretation and regulations, however, focus on crude throughput during the desired exemption period and the year immediately preceding the petition. See 40 CFR 80.1441(e)(2)(iii). This approach properly allows a small refinery, which satisfies the size threshold requirement in the time periods most relevant to the exemption, to seek hardship relief without regard to the refinery’s operations from over a decade ago. See 79 FR at 42152.⁹¹

EPA’s justification does not address the fact that Congress did not give EPA the power to unilaterally award exemptions to small refineries, but rather limited its authority to extend the temporary exemption that Congress provided to small refineries during the infancy of the RFS program.

These exemptions awarded by EPA are unlawful, inconsistent with prior positions of the agency and fly against the purpose for which Congress created the

⁹¹ R-94 at 2, n. 1 (JA491) (emphasis added).

small refinery exemption. A refinery that opened its doors a decade after the creation of the RFS Program should have factored in the RFS compliance costs associated when deciding its location, size, and product offerings to ensure that it could be economically competitive. Congress created the temporary exemption to assist existing small refineries disproportionately impacted by the mandates of the RFS Program; it was not meant to provide a subsidy to small refineries opened a decade later.

Similarly, Congress set the 75,000 barrel per day threshold knowing that there were refineries with refining capacities only marginally higher whose production might fall in the future. Congress did not provide a mechanism for such refineries to receive a small refinery exemption, and it is beyond EPA's authority to attempt to rectify that outcome through informal adjudications that it hides from the public. Congress created the RFS Program to spur innovation in renewable fuels and to increase domestic fuel production.⁹² EPA's decisions undermine that goal by providing an incentive for a refinery near the 75,000 barrel threshold to cut back production to receive the financial windfall from a full exemption.

⁹² See U.S. EPA, Renewable Fuel Standard Program, 72 Fed. Reg. 23900 (May 1, 2007) (stating RFS Program goals "to reduce dependence of foreign sources of petroleum, increase domestic sources of energy, and help transition to alternatives to petroleum in the transportation sector.")

CONCLUSION

The RFS Program imposes ongoing annual mandates on obligated parties. While ABFA's petition for review challenged EPA's changes in policy that led it to grant an unusually high number of small refinery exemptions for compliance years 2016-17, compliance year 2018 is well underway. EPA's Small Refinery Exemption Dashboard shows that EPA has received petitions from 37 small refineries seeking exemptions for compliance year 2018.

ABFA respectfully requests the Court, for the reasons set forth above, to declare as unlawful and set aside EPA's new methodology for determining disproportionate economic hardship for the purpose of granting small refinery exemptions. Similarly, ABFA respectfully requests the Court to declare as unlawful and set aside as arbitrary and capricious, not in accordance with law, and in excess of EPA's statutory authority, EPA's policy of determining disproportionate economic hardship based on a small refinery's operating losses or debts held on behalf of parent companies that are unrelated to its compliance with the RFS Program or the small refinery's purchase price of RINs absent a consideration of pass-through recoupment or the sale of exempted RINs. Finally, ABFA respectfully requests the Court to declare as unlawful and set aside as an action in excess of EPA's statutory authority the agency's policy of granting "extensions" of temporary

exemptions to small refineries that were not continuously subject to a temporary exemption in all preceding years or that never received a temporary exemption.

Respectfully submitted,

/s/ RAFE PETERSEN

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Counsel for Advanced Biofuels
Association

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 12,953 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that the brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

June 25, 2019

/s/ Rafe Petersen

Rafe Petersen

CERTIFICATE OF SERVICE

I certify that on June 25, 2019, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I further certify that on June 25, 2019, I caused to be served by postage pre-paid, first class mail sealed, unredacted copies of the foregoing brief on the following counsel of record:

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Environmental Defense Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 7611
Washington, DC 20044

Susan Stahle
Office the General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Peter Whitfield
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005

June 25, 2019

/s/ Rafe Petersen
Rafe Petersen

No. 18-1115

IN THE UNITED STATES COURT OF APPEALS
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ADVANCED BIOFUELS ASSOCIATION,

Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

On Petition for Review from the Environmental Protection Agency

**PETITIONER'S ADDENDUM 1
STATUTORY AUTHORITIES**

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rafe.petersen@hklaw.com

42 U.S.C. § 7607-Administrative proceedings and judicial review**(b) JUDICIAL REVIEW**

(1) A petition for review of . . . any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of . . . any other final action of the Administrator under this chapter . . . which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

42 U.S.C. § 7545-Regulation of fuels**(o) Renewable Fuel Program**

(1) **DEFINITIONS** In this section:

(K) Small Refinery

The term “small refinery” means a refinery for which the average aggregate daily crude oil throughput for a calendar year (as determined by dividing the aggregate throughput for the calendar year by the number of days in the calendar year) does not exceed 75,000 barrels.

(2) RENEWABLE FUEL PROGRAM**(A) Regulations**

(i) In general

Not later than 1 year after August 8, 2005, the Administrator shall promulgate regulations to ensure that gasoline sold or introduced into commerce in the United States (except in noncontiguous States or territories), on an annual average basis, contains the applicable volume of renewable fuel determined in accordance with subparagraph (B). Not later than 1 year after December 19, 2007, the Administrator shall revise the regulations under this paragraph to ensure that transportation fuel sold or introduced into commerce in the United States (except in noncontiguous States or territories), on an annual average basis, contains at least the applicable volume of renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel, determined in accordance with subparagraph (B). . . .

(9) SMALL REFINERIES**(A) Temporary exemption****(i) In general**

The requirements of paragraph (2) shall not apply to small refineries until calendar year 2011.

(ii) Extension of exemption**(I) Study by Secretary of Energy**

Not later than December 31, 2008, the Secretary of Energy shall conduct for the Administrator a study to determine whether compliance with the requirements of paragraph (2) would impose a disproportionate economic hardship on small refineries.

(II) Extension of exemption

In the case of a small refinery that the Secretary of Energy determines under subclause (I) would be subject to a disproportionate economic hardship if

required to comply with paragraph (2), the Administrator shall extend the exemption under clause (i) for the small refinery for a period of not less than 2 additional years.

(B) Petitions based on disproportionate economic hardship

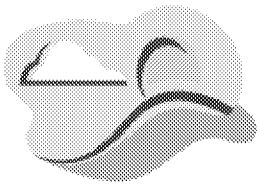
(i) Extension of exemption

A small refinery may at any time petition the Administrator for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship.

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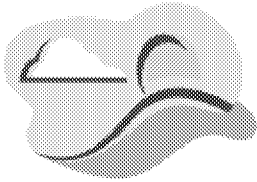
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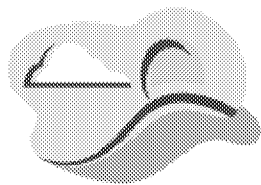
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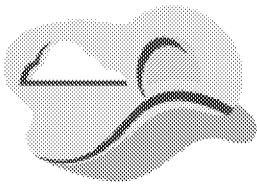
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Sent: 12/10/2020 2:47:44 PM
To: adm15.arwheeler.email [adm15.arwheeler.email@epa.gov]; Gunasekara, Mandy [gunasekara.Mandy@epa.gov]; Fotouhi, David [Fotouhi.David@epa.gov]; Moor, Karl [Moor.Karl@epa.gov]
Subject: RFS Weekly Update November 30 - Dec 4
Attachments: 2020.11.30 RFS weekly update - revised .docx

Good morning sir,

I am sending this as an FYSA. Please let me, David Fotouhi, or Karl Moor know if you have any questions.

Best,
Anne

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Subject: FW: Briefing: 2018 RFS SRE Litigation (Anne Idsal, Alexander Dominguez, Karl Moor, Kelley Raymond, Cory Preston, Abbie Tardif, David Harlow, David Fotouhi)
Attachments: 06-05-20 10AM Briefing re 2018 RFS Litigation with OGC and OAR.pdf

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Sent: Thursday, June 4, 2020 10:17 AM
To: Scott, Corey <scott.corey@epa.gov>; Molina, Michael <molina.michael@epa.gov>
Cc: Gunasekara, Mandy <gunasekara.Mandy@epa.gov>; Rakosnik, Delaney <rakosnik.delaney@epa.gov>; Bolen, Brittany <bolen.brittany@epa.gov>; Idsal, Anne <idsal.anne@epa.gov>; Moor, Karl <Moor.Karl@epa.gov>; Harlow, David <harlow.david@epa.gov>; Dominguez, Alexander <dominguez.alexander@epa.gov>; Raymond, Kelley <Raymond.Kelley@epa.gov>; Cory, Preston <Cory.Preston@epa.gov>; Tardif, Abigale (Abbie) <Tardif.Abigale@epa.gov>
Subject: RE: Briefing: 2018 RFS SRE Litigation (Anne Idsal, Alexander Dominguez, Karl Moor, Kelley Raymond, Cory Preston, Abbie Tardif, David Harlow, David Fotouhi)

Please find attached to this e-mail the paper for tomorrow's briefing. Thank you.

David Fotouhi

Principal Deputy General Counsel
 Office of General Counsel
 U.S. Environmental Protection Agency
 Tel: +1 202.564.1976
fotouhi.david@epa.gov

-----Original Appointment-----

From: Adm15Wheeler.Calendar <Adm15Wheeler.Calendar@epa.gov>
Sent: Monday, June 1, 2020 5:07 PM
To: Adm15Wheeler.Calendar; Idsal, Anne; Moor, Karl; Harlow, David; Dominguez, Alexander; Raymond, Kelley; Cory, Preston; Tardif, Abigale (Abbie); Fotouhi, David
Cc: Molina, Michael; Gunasekara, Mandy; Rakosnik, Delaney; Bolen, Brittany
Subject: Briefing: 2018 RFS SRE Litigation (Anne Idsal, Alexander Dominguez, Karl Moor, Kelley Raymond, Cory Preston, Abbie Tardif, David Harlow, David Fotouhi)
When: Friday, June 5, 2020 10:00 AM-11:00 AM (UTC-05:00) Eastern Time (US & Canada).
Where: Administrator's Office/ Conference Call : **Ex. 6 Personal Privacy (PP)**

Message

From: Frye, Tony (Robert) [frye.robert@epa.gov]
Sent: 5/18/2020 8:50:45 PM
To: Gunasekara, Mandy [gunasekara.Mandy@epa.gov]
CC: Brazauskas, Joseph [brazauskas.joseph@epa.gov]; Edwards, John (Holt) [edwards.john@epa.gov]; Voyles, Travis [Voyles.Travis@epa.gov]
Subject: FW: Binder Updates for 5.18
Attachments: 2020.05.18 - Supplemental- Budget Hearing Table of Contents.docx; AO-11 COVID External-Internal TPs.docx; OAR-2 MATS updated dh.docx; OAR-3 SAFE Clean Updated 05-18-20.docx; OAR-7 RFS-SREs updated 05-18-20.docx; OAR-8 EtO FINAL.docx; OAR-9 Methane updatedkpc.docx; OAR-14 SIP Backlog - California FINAL DRAFT_5 18 + AQPD.docx; OAR-24 DERA Clean.docx; OAR-29 CSAPR and Good Neighbor SIPs.docx; OAR-46 COVID-19 updated_CLEAN KPC.docx; OW-14 chesapeake_bay_main_04-29-20-dr-tf.docx; State AG Letter to Adm. Wheeler 5.15.20 re RFS compliance during COVID.pdf

Tony Frye

Director of Senate Affairs
Office of Congressional Affairs
Environmental Protection Agency
Cell: 202.603.3225

From: Frye, Tony (Robert)
Sent: Monday, May 18, 2020 3:44 PM
To: Scott, Corey <scott.corey@epa.gov>
Cc: Brazauskas, Joseph <brazauskas.joseph@epa.gov>; Voyles, Travis <Voyles.Travis@epa.gov>; Edwards, John (Holt) <edwards.john@epa.gov>
Subject: FW: Binder Updates for 5.18

Hey Corey – Apologies for the delay. Please find attached updates to the Administrator’s hearing for today. Thank you for your help

Tony Frye

Director of Senate Affairs
Office of Congressional Affairs
Environmental Protection Agency
Cell: 202.603.3225

Message

From: Scott, Corey [scott.corey@epa.gov]
Sent: 5/28/2020 11:59:11 PM
To: adm15.arwheeler.email [adm15.arwheeler.email@epa.gov]
CC: Gunasekara, Mandy [gunasekara.Mandy@epa.gov]; Molina, Michael [molina.michael@epa.gov]; Benevento, Douglas [benevento.douglas@epa.gov]; Hyman, Alana [Hyman.Alana@epa.gov]; Dickerson, Aaron [dickerson.aaron@epa.gov]; Coxen, Carrie [coxen.carrie@epa.gov]
Subject: Materials for 5/29/2020
Attachments: AAW - Daily Schedule - May 29, 2020.docx; ATT00001.htm; 05-29-2020 ACC BRIEFING DOC_OAR_OCSPP.docx; ATT00002.htm; Final Response Letter to Mr William P Gullledge - OAR.pdf; ATT00003.htm; HURRICANE SEASON-ADMINISTRATOR WHEELER.docx; ATT00004.htm; ST-Memo for Econ Briefing with AW-draft.docx; ATT00005.htm; Economic Analysis-Options-052920.docx; ATT00006.htm; Briefing Form OAR Check-in 5.29.20.docx; ATT00007.htm; 2020-05_CTI_Analyses_Timeline 5.28.docx; ATT00008.htm; BCA DRAFT fact sheet v4.docx; ATT00009.htm; Benefit Cost Rule Comms - v2.docx; ATT00010.htm; NRC-EPA Uranium ISR MOU section VII - OGC alternative proposal 5.28.docx; ATT00011.htm; O3-NAAQS-Review-Update-May28_2020.doc; ATT00012.htm; O3-Internal-Timeline-052820.docx; ATT00013.htm; OAR SSM Briefing Form 5.29.docx; ATT00014.htm; OAR SSM Briefing_May 14 2020 final w appendices 5.27.20.docx; ATT00015.htm; Pulp and Paper MM RTR Litigation.Rehearing.Briefing Paper.5.28.20.docx; ATT00016.htm; OGC Briefing Paper for Administrator on SSM SIP Provisions_5.29.20.docx; ATT00017.htm; Green Chemistry Challenge Awards 2020 ADD.docx; ATT00018.htm; 2018 SRE Briefing--v2020-05-28.pdf; ATT00019.htm

Sir,

Here are your materials for tomorrow, 5/29/2020. You have some of these included already but I added all files to this email for Doug and Mandy.

1. Daily Schedule for 5/29/2020
2. Call with American Chemistry Council
3. Briefing: Hurricane Preparedness
4. Briefing: Reoccupying EPA Facilities (in separate incoming email)
5. Briefing: Science Transparency
6. Check-in with OAR
7. Briefing: SSM
8. Green Chemistry Awards via Derrick Bolen
9. Materials for 6/1 RFS SRE Briefing

Thanks!

Corey

Message

From: Frye, Tony (Robert) [frye.robert@epa.gov]
Sent: 5/13/2020 7:49:56 PM
To: Gunasekara, Mandy [gunasekara.Mandy@epa.gov]; Molina, Michael [molina.michael@epa.gov]; Hanson, Paige (Catherine) [hanson.catherine@epa.gov]; Benevento, Douglas [benevento.douglas@epa.gov]; Leopold, Matt (OGC) [Leopold.Matt@epa.gov]; Schiermeyer, Corry [schiermeyer.corry@epa.gov]; Bolen, Derrick [bolen.derrick@epa.gov]; Dankert, Charles M. (Charlie) [Dankert.Charles@epa.gov]; Bloom, David [Bloom.David@epa.gov]; Willey, Katharine [willey.katharine@epa.gov]; Idsal, Anne [idsal.anne@epa.gov]; Harlow, David [harlow.david@epa.gov]; Dominguez, Alexander [dominguez.alexander@epa.gov]; Moor, Karl [Moor.Karl@epa.gov]; Cory, Preston [Cory.Preston@epa.gov]; Raymond, Kelley [Raymond.Kelley@epa.gov]; Tardif, Abigale (Abbie) [Tardif.Abigale@epa.gov]; Dunn, Alexandra [dunn.alexandra@epa.gov]; Fischer, David [Fischer.David@epa.gov]; Bolen, Derrick [bolen.derrick@epa.gov]; Bodine, Susan [bodine.susan@epa.gov]; Tran, Victoria [tran.victoria@epa.gov]; Irving, John [Irving.John@epa.gov]; Coxen, Carrie [coxen.carrie@epa.gov]; Dunlap, David [dunlap.david@epa.gov]; Fitzmorris, Amanda [fitzmorris.amanda@epa.gov]; Jones, Lindsey [jones.lindsey@epa.gov]; Vizian, Donna [Vizian.Donna@epa.gov]; Zeckman, David [zeckman.david@epa.gov]; Ross, David P [ross.davidp@epa.gov]; Wildeman, Anna [wildeman.anna@epa.gov]; Forsgren, Lee [Forsgren.Lee@epa.gov]; Bertrand, Charlotte [Bertrand.Charlotte@epa.gov]; McIntosh, Chad [mcintosh.chad@epa.gov]; Zimmer, Nathaniel [zimmer.nathaniel@epa.gov]; Yarbrough, John (Daniel) [Yarbrough.Daniel@epa.gov]; Fotouhi, David [Fotouhi.David@epa.gov]; Cody, Meredith [cody.meredith@epa.gov]; Wright, Peter [wright.peter@epa.gov]; Hoverman, Taylor [hoverman.taylor@epa.gov]; Cook, Steven [cook.steven@epa.gov]
CC: Brazauskas, Joseph [brazauskas.joseph@epa.gov]; Voyles, Travis [Voyles.Travis@epa.gov]; Edwards, John (Holt) [edwards.john@epa.gov]
Subject: RE: SEPW Briefing Binder
Attachments: 2020.05.13 - Administrator Wheeler Full Budget Binder (2).zip

2 of 2 – PLEASE LIMIT DISTRIBUTION AS APPROPRIATE

Full binder attached.

Tony Frye

Director of Senate Affairs

Office of Congressional Affairs

Environmental Protection Agency

Cell: Ex. 6 Personal Privacy (PP)

From: Frye, Tony (Robert)

Sent: Wednesday, May 13, 2020 3:47 PM

To: Gunasekara, Mandy <gunasekara.Mandy@epa.gov>; Michael Molina (molina.michael@epa.gov) <molina.michael@epa.gov>; Hanson, Paige (Catherine) <hanson.catherine@epa.gov>; Benevento, Douglas <benevento.douglas@epa.gov>; Leopold, Matt (OGC) <Leopold.Matt@epa.gov>; Schiermeyer, Corry <schiermeyer.corry@epa.gov>; Bolen, Derrick <bolen.derrick@epa.gov>; Dankert, Charles M. (Charlie) <Dankert.Charles@epa.gov>; Bloom, David <Bloom.David@epa.gov>; Willey, Katharine <willey.katharine@epa.gov>; Idsal, Anne <idsal.anne@epa.gov>; Harlow, David <harlow.david@epa.gov>; Dominguez, Alexander <dominguez.alexander@epa.gov>; Moor, Karl <Moor.Karl@epa.gov>; Cory, Preston <Cory.Preston@epa.gov>; Raymond, Kelley <Raymond.Kelley@epa.gov>; Tardif, Abigale (Abbie) <Tardif.Abigale@epa.gov>; Dunn, Alexandra <dunn.alexandra@epa.gov>; Fischer, David <Fischer.David@epa.gov>; Bolen, Derrick <bolen.derrick@epa.gov>; Bodine, Susan <bodine.susan@epa.gov>; Tran, Victoria <tran.victoria@epa.gov>; Irving, John <Irving.John@epa.gov>; Coxen, Carrie <coxen.carrie@epa.gov>; Dunlap, David <dunlap.david@epa.gov>; Fitzmorris, Amanda <fitzmorris.amanda@epa.gov>; Jones, Lindsey <jones.lindsey@epa.gov>; Vizian, Donna <Vizian.Donna@epa.gov>; Zeckman, David <zeckman.david@epa.gov>; Ross, David P <ross.davidp@epa.gov>; Wildeman, Anna <wildeman.anna@epa.gov>; Forsgren, Lee <Forsgren.Lee@epa.gov>; Bertrand, Charlotte <Bertrand.Charlotte@epa.gov>; McIntosh, Chad <mcintosh.chad@epa.gov>; Zimmer, Nathaniel

<zimmer.nathaniel@epa.gov>; Yarbrough, John (Daniel) <Yarbrough.Daniel@epa.gov>; Fotouhi, David <fotouhi.david@epa.gov>; Cody, Meredith <cody.meredith@epa.gov>; Wright, Peter <wright.peter@epa.gov>; Hoverman, Taylor <hoverman.taylor@epa.gov>; Cook, Steven <cook.steven@epa.gov>
Cc: Brazauskas, Joseph <brazauskas.joseph@epa.gov>; Voyles, Travis <Voyles.Travis@epa.gov>; Edwards, John (Holt) <edwards.john@epa.gov>
Subject: SEPW Briefing Binder

1 of 2 – PLEASE LIMIT DISTRIBUTION AS APPROPRIATE

Hello All – I apologize for my delay in sending these documents around, there are still some moving parts, but we wanted to get the majority of what is finalized to you before the last hold outs.

Attached, please find the truncated SEPW hearing binder that is currently with the Administrator for his review prior to briefings this week in advance of his hearing Wednesday. All of the sheets in this file should be highlighted in the attached TOC.

Following this email, I will send another with the full binder that reflects all of the documents on the TOC, the file is simply too large to get into one email.

There have been a lot of moving parts in this process, please let me know if you have any questions, think I missed a sheet your office provided to OCIR, or have any comments.

Have a great day!

Best,
Tony

Tony Frye
Director of Senate Affairs
Office of Congressional Affairs
Environmental Protection Agency
Cell: Ex. 6 Personal Privacy (PP)

Message

From: Dominguez, Alexander [dominguez.alexander@epa.gov]
Sent: 5/8/2020 8:32:44 PM
To: Gunasekara, Mandy [gunasekara.Mandy@epa.gov]
CC: Idsal, Anne [idsal.anne@epa.gov]; Moor, Karl [Moor.Karl@epa.gov]; Harlow, David [harlow.david@epa.gov]; Cory, Preston [Cory.Preston@epa.gov]
Subject: Pending RFS SRE Issues
Attachments: OAR Pending SRE RFS Issues 05.08.20_final.docx

Mandy,

Per your request, please find the attached document highlighting four distinct RFS issues that are currently unresolved. For awareness, while it has yet to be scheduled, OTAQ anticipates being prepared to brief Anne next week on the

Ex. 5 Deliberative Process (DP)

Alex Dominguez
Senior Policy Advisor | Office of Air and Radiation
U.S. Environmental Protection Agency
Desk: 202.564.3164 Cell: 202.578.5985

Message

From: Frye, Tony (Robert) [frye.robert@epa.gov]
Sent: 5/19/2020 10:41:17 PM
To: Gunasekara, Mandy [gunasekara.Mandy@epa.gov]; Molina, Michael [molina.michael@epa.gov]; Benevento, Douglas [benevento.douglas@epa.gov]; Hanson, Paige (Catherine) [hanson.catherine@epa.gov]; Schiermeyer, Corry [schiermeyer.corry@epa.gov]; Bolen, Brittany [bolen.brittany@epa.gov]; Dankert, Charles M. (Charlie) [Dankert.Charles@epa.gov]; Leopold, Matt (OGC) [Leopold.Matt@epa.gov]; Fotouhi, David [Fotouhi.David@epa.gov]; Willey, Katharine [willey.katharine@epa.gov]
CC: Brazauskas, Joseph [brazauskas.joseph@epa.gov]; Voyles, Travis [Voyles.Travis@epa.gov]; Edwards, John (Holt) [edwards.john@epa.gov]
Subject: Full Administrator Hearing Binder
Attachments: 2020.05.19 - Administrator Wheeler Full Budget Binder.zip

Hello All – Attached, please find the most up to date version of the Administrator’s binder. Let me know if you have any questions.

Best,
Tony

Tony Frye
Director of Senate Affairs
Office of Congressional Affairs
Environmental Protection Agency
Cell: 202.603.3225

Message

From: Brazauskas, Joseph [brazauskas.joseph@epa.gov]
Sent: 5/19/2020 4:47:54 PM
To: adm15.arwheeler.email [adm15.arwheeler.email@epa.gov]
CC: Gunasekara, Mandy [gunasekara.Mandy@epa.gov]; Voyles, Travis [Voyles.Travis@epa.gov]; Frye, Tony (Robert) [frye.robert@epa.gov]; Scott, Corey [scott.corey@epa.gov]; Bolen, Brittany [bolen.brittany@epa.gov]
Subject: FW: Update Package to Administrator Hearing Binder
Attachments: 2020.05.19 - Supplemental- Budget Hearing Table of Contents.docx; OAR-7 RFS-SREs updated 05-18-20.docx; OAR-8 EtO OGC edits.docx; OAR-47 PM Harvard Study.docx; OAR-48 Regional Haze KLV JHE.docx; ORD-21 Subway Research One Pager 5-19-20.docx; OW-7 SFPUC-JMK update 5.12.20_TV_DF_GS.docx; OW-16 col_river_tmdl_05-12-20 - OGCjlk.docx

Sir, these are the latest fact sheets to be printed out, Corey just received them. We are just now waiting on OMS (negotiations), Chesapeake, and some additional SAFE TPs related to the EE news story that ran today. Thanks, Joe

Joseph A. Brazauskas Jr.

Associate Administrator
 Office of Congressional & Intergovernmental Relations
 U.S. Environmental Protection Agency
 (202) 564-5189

From: Frye, Tony (Robert) <frye.robert@epa.gov>
Sent: Tuesday, May 19, 2020 12:31 PM
To: Scott, Corey <scott.corey@epa.gov>
Cc: Brazauskas, Joseph <brazauskas.joseph@epa.gov>; Edwards, John (Holt) <edwards.john@epa.gov>; Voyles, Travis <Voyles.Travis@epa.gov>
Subject: Update Package to Administrator Hearing Binder

Hello Corey – Attached, please find edits to the Table of Contents reflecting updated and newly added sheets and updated sheets from OAR, ORD, and OW. We still have one OMS, OAR, and OW sheet respectively outstanding, but will follow up ASAP. Let me know if you have any questions. Thank you for your help.

Bet,
 Tony

Tony Frye

Director of Senate Affairs
 Office of Congressional Affairs
 Environmental Protection Agency
 Cell: Ex. 6 Personal Privacy (PP)

Message

From: Powell, John [john.powell@hq.doe.gov]
Sent: 3/21/2020 2:42:51 PM
To: Gunasekara, Mandy [gunasekara.Mandy@epa.gov]
CC: Menezes, Mark [mark.menezes@hq.doe.gov]
Subject: FW: [EXTERNAL] 700 million RINs.docx
Attachments: 700 million RINs.docx

Mandy,

Attached is a talking paper. I have tried to capture our conversation and have included a potential implementation procedure for further discussion.

Look forward to continued discussions

John Powell

Sent with BlackBerry Work
(www.blackberry.com)

Message

From: Dominguez, Alexander [dominguez.alexander@epa.gov]
Sent: 8/20/2020 1:40:31 PM
To: Gunasekara, Mandy [gunasekara.Mandy@epa.gov]
Subject: FW: For Review: RFS Talking Points
Attachments: RFS Biofuel Talking Points August 11 OAR-IO_mb.docx

Following up on this and see if you had any edits. Thank you!

From: Dominguez, Alexander
Sent: Tuesday, August 18, 2020 10:37 AM
To: Mandy Gunasekara (gunasekara.Mandy@epa.gov) <gunasekara.Mandy@epa.gov>
Subject: FW: For Review: RFS Talking Points

For your review.

From: Dominguez, Alexander
Sent: Friday, August 14, 2020 12:09 PM
To: Mandy Gunasekara (gunasekara.Mandy@epa.gov) <gunasekara.Mandy@epa.gov>
Subject: FW: For Review: RFS Talking Points

Mandy – Please see attached RFS Biofuel Talking Points with OPA edits. Let me know if you have any edits – you are the final layer of review - and happy to discuss.

From: Block, Molly <block.molly@epa.gov>
Sent: Friday, August 14, 2020 10:33 AM
To: Dominguez, Alexander <dominguez.alexander@epa.gov>; Hewitt, James <hewitt.james@epa.gov>
Cc: Cory, Preston <Cory.Preston@epa.gov>
Subject: RE: For Review: RFS Talking Points

Great! I think these are good to go to her for review.

From: Dominguez, Alexander <dominguez.alexander@epa.gov>
Sent: Friday, August 14, 2020 10:32 AM
To: Block, Molly <block.molly@epa.gov>; Hewitt, James <hewitt.james@epa.gov>
Cc: Cory, Preston <Cory.Preston@epa.gov>
Subject: RE: For Review: RFS Talking Points

Thank you. No, these have not been reviewed by Mandy. I am happy to forward and cc you all

From: Block, Molly <block.molly@epa.gov>
Sent: Friday, August 14, 2020 10:24 AM
To: Dominguez, Alexander <dominguez.alexander@epa.gov>; Hewitt, James <hewitt.james@epa.gov>
Cc: Cory, Preston <Cory.Preston@epa.gov>
Subject: RE: For Review: RFS Talking Points

Track changes attached. Have these been run by Mandy?

From: Dominguez, Alexander <dominguez.alexander@epa.gov>
Sent: Wednesday, August 12, 2020 2:35 PM

To: Hewitt, James <hewitt.james@epa.gov>; Block, Molly <block.molly@epa.gov>

Cc: Cory, Preston <Cory.Preston@epa.gov>

Subject: For Review: RFS Talking Points

James and Molly,

Attached is a comprehensive set of RFS talking points that have been reviewed by OAR-IO. Will you please review and provide any edits by COB Friday, August 14th. Ideally earlier if possible but I understand there is quite a bit going on right now and that may not be feasible.

Ex. 5 Deliberative Process (DP)

Please take a look and I am happy to discuss at our bi-weekly tomorrow at 3:00PM.

Thank you,
Alex

Message

From: Gunasekara, Mandy [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=F639EA28AF4C455493939E3129260707-GUNASEKARA,]
Sent: 5/18/2020 6:28:11 PM
To: Brazauskas, Joseph [brazauskas.joseph@epa.gov]
Subject: FW: Small Refinery Petition
Attachments: 2020.03.30 Wheeler Waiver Petition with Attachment CONTAINS CBI.pdf

From: Dominguez, Alexander <dominguez.alexander@epa.gov>
Sent: Monday, May 18, 2020 2:21 PM
To: Gunasekara, Mandy <gunasekara.Mandy@epa.gov>
Subject: RE: Small Refinery Petition

Attached

From: Gunasekara, Mandy <gunasekara.Mandy@epa.gov>
Sent: Monday, May 18, 2020 2:16 PM
To: Dominguez, Alexander <dominguez.alexander@epa.gov>
Subject: Small Refinery Petition

Can you please send me the "21 small refinery" petition/letter with appendix that we received in March?

Mandy M. Gunasekara
Chief of Staff, US EPA
O: (202) 564-6999 C: 202-923-5320

Message

From: Gunasekara, Mandy [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=F639EA28AF4C455493939E3129260707-GUNASEKARA,]
Sent: 5/22/2020 11:20:39 PM
To: Molina, Michael [molina.michael@epa.gov]
Subject: FW: Letter from RFA re: "gap year" small refinery exemption petitions
Attachments: RFA Letter to EPA re Past Year SRE Petitions.pdf

FYI – see highlighted. Let's chat about this sometime next week.

From: Geoff Cooper <GCooper@ethanolrfa.org>
Sent: Friday, May 22, 2020 4:01 PM
To: Gunasekara, Mandy <gunasekara.Mandy@epa.gov>
Subject: FW: Letter from RFA re: "gap year" small refinery exemption petitions

Hi Mandy,

FYI. Wanted to make sure you saw this. We are greatly concerned about the "gap year" SRE petition filings referenced by both Administrator Wheeler and DOE Under Secretary Menezes Wednesday.

Candidly, it was also a bit frustrating to hear the Administrator say "I have talked personally with a number of small refiners all over the country," because we have had trouble getting on his calendar for a meeting to discuss these issues from the ethanol industry's perspective. On that score, has there been any further discussion about Mr. Wheeler meeting with us?

Thanks and have a good holiday weekend.

Regards,
 Geoff

From: Geoff Cooper
Sent: Friday, May 22, 2020 2:25 PM
To: Wheeler.andrew@Epa.gov
Cc: idsal.anne@epa.gov; Dunham.Sarah@epa.gov; francis.j.brooke@who.eop.gov; mark.menezes@hq.doe.gov
Subject: Letter from RFA re: "gap year" small refinery exemption petitions

Administrator Wheeler,

We were alarmed to recently learn that small refiners are submitting so-called "gap year" RFS exemption petitions to EPA. The petitions are an obvious attempt to circumvent the recent Tenth Circuit Court decision and the requirement that petitions may only be approved if they are continuous "extensions" of previously existing exemptions. If granted by EPA, these prior-year SREs would be wholly inconsistent with Congressional intent, judicial precedent, EPA's own policies and regulations, and any sense of fairness to America's farmers and ethanol producers.

Please find attached a letter outlining our concerns with the "gap filings." We would appreciate the opportunity to further discuss this issue and others with you at your earliest convenience. Thank you.

Regards,

Geoff

Geoff Cooper
President & CEO
Renewable Fuels Association
O: 636.594.2284
C: 636.399.4928

CONFIDENTIALITY NOTE: This e-mail message, including any attachment(s), contains information that may be confidential, protected by the attorney-client or other legal privileges, and/or proprietary non-public information. If you are not an intended recipient of this message or an authorized assistant to an intended recipient, please notify the sender by replying to this message and then delete it from your system. Use, dissemination, distribution, or reproduction of this message and/or any of its attachments (if any) by unintended recipients is not authorized and may be unlawful.

Message

From: Gunasekara, Mandy [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=F639EA28AF4C455493939E3129260707-GUNASEKARA,]
Sent: 3/23/2020 6:51:37 PM
To: adm15.arwheeler.email [adm15.arwheeler.email@epa.gov]
Subject: 700 million RINs.docx
Attachments: 700 million RINs.docx; ATT00001.txt

Message

From: Gunasekara, Mandy [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=F639EA28AF4C455493939E3129260707-GUNASEKARA,]
Sent: 9/12/2020 4:03:54 PM
To: Brian.V.McCormack2@omb.eop.gov
Subject: RE: Gap Filling Press Statement_FINAL DRAFT 2020 09 12_clean.docx
Attachments: Gap_Filling Petition Denial_FINAL DRAFT_2020 09 12.docx

And here is the letter. Substantive stuff starts on page 3.

-----Original Message-----

From: Gunasekara, Mandy
Sent: Saturday, September 12, 2020 11:48 AM
To: Brian.V.McCormack2@omb.eop.gov
Subject: Gap Filling Press Statement_FINAL DRAFT 2020 09 12_clean.docx

Statement- approved by COS. Ready to go on Monday.

Message

From: Gunasekara, Mandy [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=F639EA28AF4C455493939E3129260707-GUNASEKARA,]
Sent: 9/12/2020 3:05:20 PM
To: francis.j.brooke@who.eop.gov
Subject: Letter
Attachments: Gap_Filling Petition Denial_FINAL DRAFT_2020 09 12.docx

See attached. The substantive stuff starts top of page 3.

Mandy M. Gunasekara

Chief of Staff, US EPA

C: 202-923-5320

“We serve at the pleasure of the President.”

Message

From: farmdoc Project [farmpolicynews@illinois.edu]
Sent: 9/10/2020 3:02:14 PM
To: Hengst, Benjamin [Hengst.Benjamin@epa.gov]
Subject: Farm Policy News Update: September 10, 2020

Farm Policy News Update: *|DATE: F j, Y|*

September 10, 2020

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Farm Policy News

LATEST NEWS SUMMARY

President Trump Instructs EPA to Deny Retroactive ("Gap-Year") SRE (Small-Refinery Exemption) Waiver Requests

Reuters writers Stephanie Kelly, Jeff Mason and Jarrett Renshaw reported on Tuesday that, "U.S. President Donald Trump has instructed that dozens of oil refiner requests for retroactive waivers from U.S. biofuel laws be denied amid concerns the issue could cut...

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President Trump Instructs EPA to Deny Retroactive ("Gap-Year") SRE (Small-Refinery Exemption) Waiver Requests

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Brazil Wants U.S. Counterpart to Negotiate Ethanol Import Tax

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China: High Demand for Farm Commodities Expected, as Food Inflation and Security Jitters Persist

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Federal Reserve: Observations on the Ag Economy- August 2020

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September 2, 2020

**2020 Farm Sector Income Forecast,
September**

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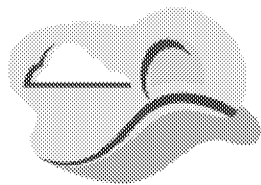
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Message

From: Governors' Biofuels Coalition [larry@governorscoalition.org]
Sent: 7/17/2020 12:00:45 PM
To: Hengst, Benjamin [Hengst.Benjamin@epa.gov]
Subject: Today's Biofuels News

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GOVERNORS' BIOFUELS COALITION

NEWS UPDATE**July 17, 2020*****Top Story*****EPA Adds Six Additional Requests for Small-Refinery Exemptions to Dashboard**

By Todd Neeley, DTN Staff Reporter • • Posted July 16, 2020

The EPA on Thursday posted six additional pending requests for retroactive small-refinery exemptions to the Renewable Fuel Standard to the agency dashboard, bringing the grand total to 58 such requests for waivers for compliance years 2011 through 2018. The agency now lists seven pending requests each for 2011 and 2012, 11 each for 2013 and 2015, 12 in 2014, eight in 2016 and two in 2018, in addition there are 27 listed for 2019 and one for 2020. [[read more ...](#)]

Retroactive SRE Applications**Minnesota Senator pushing hard to stop "gap-year" RFS waivers**

By Mark Dorenkamp, Brownfield News • • Posted July 16, 2020

A member of the Senate Ag Committee says she's pushing hard in a bipartisan way to make sure more than 50 so-called "gap year" small refinery exemption requests get denied. Minnesota Democrat Tina Smith tells Brownfield the oil refineries behind these petitions are not living up to their legal obligation under the RFS. [[read more ...](#)]

Relief**Ethanol Industry's COVID-Related Economic Losses Already Top \$3.4 Billion, Could Reach Nearly \$9 Billion by 2021**

By Ken Colombini, RFA • • Posted July 16, 2020

The COVID-19 crisis has already led to more than \$3.4 billion in lost revenues for the U.S. ethanol industry, according to an economic analysis released today by the Renewable Fuels Association. Based on the latest projections from the Energy Information Administration and the

Food and Agriculture Policy Research Institute, the RFA study also found that pandemic-related damages in 2020 and 2021 could reach nearly \$9 billion. [[read more ...](#)]

Pandemic

Work-From-Home Culture Will Cut Billions of Miles of Driving

By Keith Naughton, Bloomberg • • Posted July 16, 2020

Working from home and online shopping have become the new normal and that will reduce driving in the U.S. by up to 270 billion miles a year, according to new study. The research conducted by consultant KPMG International finds the cocoon culture Covid-19 has created is not going away — even if a vaccine is made widely available — and that will have potentially dire consequences for the auto industry. For starters, the decline in commuting will remove 14 million cars from U.S. roads, the KPMG study forecasts. [[read more ...](#)]

Ethanol producer says industry's post-COVID outlook is improving, but not profitable

By Larry Lee, Brownfield News • • Posted July 16, 2020

An ethanol producer says the early days of coronavirus brought financial losses that unrivaled anything since the beginning of the industry. Erik Huschitt is the CEO and General Manager at Badger State Ethanol and serves as the President of the Wisconsin Biofuels Association board. He says, "It wasn't uncommon for an ethanol plant to be hemorrhaging millions of dollars a month at that time." [[read more ...](#)]

Market

Green Plains to Further Increase FCC and USP Grade Alcohol Capacity

By GLOBE NEWSWIRE • • Posted July 17, 2020

Green Plains Inc. (NASDAQ:GPPE) today announced its subsidiary, Green Plains Wood River LLC has installed a separate 25 million gallon facility engineered and constructed by ICM, Inc. to produce FCC Grade alcohol for domestic and export markets and expects to upgrade the production process to produce USP Grade alcohol over the next four to six months. [[read more ...](#)]

EIA: Weekly ethanol production up 2%, stocks down slightly

By Ethanol Producer Magazine • • Posted July 16, 2020

U.S. ethanol production was up nearly 2 percent for the week ending July 10, while weekly ending stocks of fuel ethanol were down slightly, according to data released by the U.S. Energy Information Administration on July 15. [[read more ...](#)]

Campaign 2020

The oil lobby is already finding fault with Biden's new climate plan

By Dino Grandoni with Paulina Firozi, Washington Post • • Posted July 16, 2020

The oil and gas sector is not thrilled with several parts of Joe Biden's new climate plan. Petroleum industry representatives are arguing the former vice president's plan to mandate a transition from gas-fired power to renewables will hasten the ongoing decline of union jobs and add to the strife the industry is already feeling due to the coronavirus pandemic. [[read more ...](#)]

Biofuel groups weigh in on Biden's clean energy plan

By Erin Voegele, Biomass Magazine • • Posted July 16, 2020

Presumptive democratic presidential nominee and former Vice President Joe Biden on July 14 released a proposal for rebuilding the economy that focuses on establishing American leadership in the clean energy industry. As part of the plan, Biden aims for the U.S. to achieve a 100 percent clean energy economy and reach a goal of net-zero emissions by 2050. The plan includes a proposal to make \$1.7 trillion in federal investments over the next 10 years, leveraging additional private sector and state and local investments to total more than \$5 trillion. [[read more ...](#)]

Note: News clips provided do not necessarily reflect the views of coalition or its member governors.

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Governors' Coalition
P.O. Box 94922
Lincoln, NE 68509

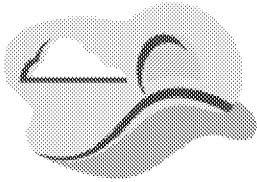
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Subject: Today's Biofuels News

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GOVERNORS' BIOFUELS COALITION

NEWS UPDATE

June 29, 2020

Top Story

Governors Ask EPA to Reject Retroactive Refinery Exemptions

By Governors' Biofuels Coalition • • Posted June 29, 2020

Today, South Dakota Governor Kristi Noem and Minnesota Governor Tim Walz sent a letter to EPA Administrator Andrew Wheeler asking that he reject 52 applications for retroactive small refinery exemptions (SREs) from the Renewable Fuel Standard (RFS) for past compliance years. Governor Noem and Governor Walz are the chair and vice chair of the Governors' Biofuels Coalition. Iowa Governor Kim Reynolds and Nebraska Governor Pete Ricketts, former Coalition chairs, also joined the letter. [[read more ...](#)]

Pandemic

Pandemic's Cleaner Air Could Reshape What We Know About the Atmosphere

By Coral Davenport, New York Times • • Posted June 28, 2020

"Our goal is not just to celebrate the silver lining but to seize upon that lining and institutionalize it," said Benjamin H. Grumbles, the head of Maryland's environmental agency. Policy experts say the new data could even bolster legal fights against the Trump administration's efforts to roll back major air pollution regulations. Early studies appear to show that even as the coronavirus took more than 100,000 American lives, deaths related to more typical respiratory illnesses like asthma and lung disease fell in the clean air, boosting the case that Mr. Trump's environmental rollbacks will contribute to thousands of deaths. [[read more ...](#)]

Retroactive SRE Applications

Republican blocks Trump's pick for deputy administrator

By Kevin Bogardus, E&E News reporter • • Posted June 28, 2020

A farm-state Republican senator plans to vote against a top EPA nominee over biofuel waivers, essentially blocking his confirmation. Sen. Joni Ernst (R-Iowa) announced today that Doug

Benevento, President Trump's nominee for deputy EPA administrator, does not have her support. [[read more ...](#)]

Senators urge EPA to reject 52 'gap year' SRE petitions

By Erin Voegelé, Biomass Magazine • • Posted June 28, 2020

A bipartisan group of 16 senators sent a letter to U.S. EPA Administrator Andrew Wheeler on June 25 urging him to reject the 52 gap year small refinery exemption (SRE) petitions recently filed by small refineries in an effort to circumvent the Tenth Circuit Court's January ruling that determined the EPA cannot extend exemptions under the Renewable Fuel Standard to any small refinery whose earlier, temporary exemptions had lapsed. [[read more ...](#)]

Senators Call on EPA to Reject Gap-Year Refinery Waivers 'Outright'

By Ken Colombini, RFA • • Posted June 28, 2020

Echoing the grave concern expressed by the Renewable Fuels Association and others, a bipartisan group of 16 Senators today called on U.S. Environmental Protection Agency Administrator Andrew Wheeler to outright reject the 52 retroactive "gap-year" RFS waivers newly requested by oil refiners. Leading the effort were Sens. Amy Klobuchar (D-MN), Joni Ernst (R-IA), Tammy Duckworth (D-IL) and Chuck Grassley (R-IA). [[read more ...](#)]

Sen. Joni Ernst tells EPA director to 'trash' small refinery waivers

By James Q. Lynch, The Gazette • • Posted June 28, 2020

U.S. Sen. Joni Ernst has told the EPA administrator to "just trash" 52 small refinery waivers under consideration by the agency because they could have a devastating impact on Iowa's renewable fuels industry. Although Environmental Protection Agency Administrator Andrew Wheeler is upholding the letter of the law, Ernst said allowing petroleum refiners to be exempted from the Renewable Fuel Standard would not be in the spirit of the law. [[read more ...](#)]

Policy & Politics

Biofuel groups urge Congress to extend tax biofuel credits

By Erin Voegelé, Ethanol Producer Magazine • • Posted June 28, 2020

The Advanced Biofuels Business Council, Algae Biomass Organization, Biotechnology Innovation Organization, Growth Energy, National Biodiesel Board and Renewable Fuels Association sent a letter to the House Ways and Means Committee on June 19 expressing support for the proposed extension of tax incentives for advanced biofuels. "As the Ways and Means Committee contemplates moving a package of clean energy tax provisions included in the GREEN Act, we would like to thank you for your vision and express our strong support for your proposed extension of the suite of advanced biofuels tax incentives," they wrote. [[read more ...](#)]

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Governors' Coalition
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Lincoln, NE 68509



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From: farmdoc Project [farmpolicynews@illinois.edu]
Sent: 6/25/2020 3:01:58 PM
To: Hengst, Benjamin [Hengst.Benjamin@epa.gov]
Subject: Farm Policy News Update: June 25, 2020

Farm Policy News Update: *|DATE: F j, Y|*

June 25, 2020

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Farm Policy News

LATEST NEWS SUMMARY

Senate Ag Committee Hearing: Monetizing Voluntary Conservation Practices

On Wednesday, the Senate Agriculture Committee held a Legislative Hearing to Review S. 3894, The Growing Climate Solutions Act of 2020.

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June 24, 2020

**Senate Ag Committee Hearing:
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June 23, 2020

**COVID-19 Ag Related Losses Mount, as
China Seeks Virus Documentation on
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June 22, 2020

**A Closer Look at U.S. Meat Production
from USDA's Economic Research
Service**

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June 21, 2020

**China to Accelerate U.S. Farm
Purchases, as Trade Partners Raise
Concerns Over U.S. Farm Assistance**

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June 18, 2020

**EPA Receives 52 Retroactive SRE
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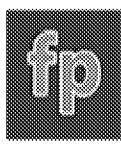
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From: farmdoc Project [farmpolicynews@illinois.edu]
Sent: 6/24/2020 3:03:21 PM
To: Hengst, Benjamin [Hengst.Benjamin@epa.gov]
Subject: Farm Policy News Update: June 24, 2020

Farm Policy News Update: *|DATE: F j, Y|*

June 24, 2020

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Farm Policy News

LATEST NEWS SUMMARY

COVID-19 Ag Related Losses Mount, as China Seeks Virus Documentation on Soybeans

Donnelle Eller reported on the front page of Tuesday's Des Moines Register that, "The Trump administration has sent \$4 billion in payments to U.S. farmers to help cover losses due to the coronavirus, part of \$16 billion that's available to provide direct...

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June 22, 2020

A Closer Look at U.S. Meat Production from USDA's Economic Research Service

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China to Accelerate U.S. Farm Purchases, as Trade Partners Raise Concerns Over U.S. Farm Assistance

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June 18, 2020

EPA Receives 52 Retroactive SRE (Small-Refinery Exemption) Requests

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June 18, 2020

**USTR Lighthizer Defends Phase One
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June 22, 2020

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Farm Policy News

LATEST NEWS SUMMARY

China to Accelerate U.S. Farm Purchases, as Trade Partners Raise Concerns Over U.S. Farm Assistance

Bloomberg News reported on Friday that, "China plans to accelerate purchases of American farm goods to comply with the phase one trade deal with the U.S. following talks in Hawaii this week."

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China to Accelerate U.S. Farm

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**Purchases, as Trade Partners Raise
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**China Continues to Buy American
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**Cause for Concern? Government
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June 19, 2020

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Farm Policy News

LATEST NEWS SUMMARY

EPA Receives 52 Retroactive SREs (Small-Refinery Exemption) Requests

Reuters writer Stephanie Kelly reported on Thursday that, "The U.S. Environmental Protection Agency has received 52 new petitions for retroactive biofuel blending waivers that, if granted, would help bring oil refiners into compliance with a court ruling this year, EPA..."

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**China Continues to Buy American
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June 14, 2020

**Cause for Concern? Government
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June 9, 2020

**FAPRI: Baseline Update for U.S.
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Message

From: Dominguez, Alexander [dominguez.alexander@epa.gov]
Sent: 6/4/2020 8:13:29 PM
To: Idsal, Anne [idsal.anne@epa.gov]
Subject: RFS Materials
Attachments: Petitions to Waive Volumes Under General Waiver Authority.06.04.20.docx; Petitions Briefing for OAR.pptx; OAR Pending SRE RFS Issues 05.08.20_final.docx; 2020.03.30 Wheeler Waiver Petition with Attachment CONTAINS CBI.pdf

Flag: Follow up

Anne – The attached materials should prove helpful for tomorrow’s discussion. The only document you have not previously reviewed is Petitions to Waive Volumes Under General Waiver Authority. Per Joe, I focused primarily on the Perkins Coie petition. Please let me know if you would like to discuss.

Alex

Message

From: Dominguez, Alexander [dominguez.alexander@epa.gov]
Sent: 7/14/2019 9:43:26 PM
To: Idsal, Anne [idsal.anne@epa.gov]
Subject: Small Refinery Hardship Briefing
Attachments: RFS Small Refinery Hardship Briefing for Administrator Wheeler_2.6.19.pptx

Most comprehensive (and recent) briefing on small refinery exemptions. For awareness, while the cover slide says briefing for Wheeler I am certain that still has not happened.

Message

From: Nelson, Karen [nelson.karen@epa.gov]
Sent: 11/14/2019 4:21:09 PM
To: Kim, Jung [Kim.Jung@epa.gov]; Larson, Ben [Larson.Ben@epa.gov]
CC: Weihrauch, John [Weihrauch.John@epa.gov]
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

<!--[if lte mso 15 || CheckWebRef]-->

Nelson, Karen has shared a OneDrive for Business file with you. To view it, click the link below.



Memo re. Refinery Compliance Demonstration for 2018 RIN Vintage Letter_DRAFT.docx

<!--[endif]-->

Hey Jung!

That sounds good! I will use that language. I've also attached the share point version of the memo so you all can review it. However, I'm still updating it with some of the info below. I would appreciate it if you or Ben, or John if he believes necessary, review it before it goes to OGC.

Thanks!

-Karen

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From: Kim, Jung <Kim.Jung@epa.gov>
Sent: Thursday, November 14, 2019 11:15 AM
To: Larson, Ben <Larson.Ben@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>
Cc: Weihrauch, John <Weihrauch.John@epa.gov>
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

Thanks Ben for your inputs!

Karen – For the last question, we may say that we manage the RIN transactions using EMTS and our compliance reports are stored in our secured server.

I'm adding John to this email chain.

Thanks,

Jung

From: Larson, Ben <Larson.Ben@epa.gov>
Sent: Thursday, November 14, 2019 11:05 AM
To: Kim, Jung <Kim.Jung@epa.gov>; Nelson, Karen <nelson.karen@epa.gov>
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

Ex. 5 Deliberative Process (DP)

From: Kim, Jung <Kim.Jung@epa.gov>
Sent: Thursday, November 14, 2019 10:50 AM
To: Nelson, Karen <nelson.karen@epa.gov>
Cc: Larson, Ben <Larson.Ben@epa.gov>
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

Hi Karen,

Please see my response in red below.
 I am adding Ben – anything I missed?

Thanks,

Jung

From: Nelson, Karen <nelson.karen@epa.gov>
Sent: Thursday, November 14, 2019 10:34 AM
To: Kim, Jung <Kim.Jung@epa.gov>
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

Hey Jung!

I'm drafting a short explanation of the information included in the table you sent around yesterday, and I've got a few follow-up questions:

Was all the information in the table taken from the refineries' RFS0303 report? Both RFS0303 (annual compliance report) and EMTS transactions

Other than received an exemption, what are some reasons why a refiner would resubmit its RFS0303 report? A refiner is required to submit attest engagement by June 1 following the submission of the annual compliance report (March 31). They may have discovered mis-calculation of annual gasoline volume during attest audit. Or it could be due to simple transposition error or any reporting error (incorrect company ID, compliance basis, report year, etc)

How does a refiner submit its RFS0303 report? Electronically via OTAQ DCFUEL Submission
 (<https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockkey=P100UBBA.pdf>)

How do we maintain the information (in EMTS, in PDF format on a secure server, other)?

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Once I've got that write-up done, I'll send it to you and the other for review before sending it to OGC.

Thanks!

-Karen

From: Kim, Jung <Kim.Jung@epa.gov>
Sent: Wednesday, November 13, 2019 11:53 AM
To: Nelson, Karen <nelson.karen@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>;
 Stahle, Susan <Stahle.Susan@epa.gov>
Cc: Weihrauch, John <Weihrauch.John@epa.gov>
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

Hi Karen,

Please find attached the appendix table with annual compliance report columns (Column F & G) and EMTS transaction (Column H & I). - New columns are highlighted.

Please note that we have sent an instruction for SRE RIN restore(un-retire) and annual compliance reporting re-submission on 8/12/2019.

The refiners have resubmitted the reports with the updated RVO (zero) and deficit (zero) after 8/12.

Please review the table and let me know if you have any questions or concerns.
I will send a password separately.

Thanks,

Jung

From: Nelson, Karen <nelson.karen@epa.gov>
Sent: Wednesday, November 13, 2019 9:24 AM
To: Kim, Jung <Kim.Jung@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>
Cc: Weihrauch, John <Weihrauch.John@epa.gov>
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

I thought that may be the case, particularly for RIN retirement dates. Thanks for adding those in! I do think it will be useful to include those dates the record.
-Karen

From: Kim, Jung <Kim.Jung@epa.gov>
Sent: Wednesday, November 13, 2019 9:10 AM
To: Nelson, Karen <nelson.karen@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>
Cc: Weihrauch, John <Weihrauch.John@epa.gov>
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

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Sent: Wednesday, November 13, 2019 8:49 AM
To: Kim, Jung <Kim.Jung@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>
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Thanks!
-Karen

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Thanks,

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Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

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To: Kim, Jung <Kim.Jung@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>
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From: Nelson, Karen <nelson.karen@epa.gov>
Sent: Thursday, November 07, 2019 11:43 AM
To: Cohen, Janet <cohen.janet@epa.gov>; McKenna, Chris <McKenna.Chris@epa.gov>; Parsons, Nick <Parsons.Nick@epa.gov>; Michaels, Lauren <Michaels.Lauren@epa.gov>; Spencer, Mark <spencer.mark@epa.gov>
Cc: Stahle, Susan <Stahle.Susan@epa.gov>
Subject: DPP: Memo to the record for the RIN Vintage Letter

Hi Team,

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Thanks!
-Karen

Thank you for your time.

Sincerely,
Karen Nelson
Compliance Division
(734) 214-4657

Do not release without review. This email and any attached documents may contain information claimed as CBI, confidential attorney-client communications, privileged attorney work product, and/or privileged and confidential deliberative process material.

Message

From: Nelson, Karen [nelson.karen@epa.gov]
Sent: 11/14/2019 3:33:40 PM
To: Kim, Jung [Kim.Jung@epa.gov]
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

Hey Jung!

I'm drafting a short explanation of the information included in the table you sent around yesterday, and I've got a few follow-up questions:

Was all the information in the table taken from the refineries' RFS0303 report?

Other than received an exemption, what are some reasons why a refiner would resubmit its RFS0303 report?

How does a refiner submit its RFS0303 report?

How do we maintain the information (in EMTS, in PDF format on a secure server, other)?

Once I've got that write-up done, I'll send it to you and the other for review before sending it to OGC.

Thanks!
 -Karen

From: Kim, Jung <Kim.Jung@epa.gov>
Sent: Wednesday, November 13, 2019 11:53 AM
To: Nelson, Karen <nelson.karen@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>
Cc: Weihrauch, John <Weihrauch.John@epa.gov>
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

Hi Karen,

Please find attached the appendix table with annual compliance report columns (Column F & G) and EMTS transaction (Column H & I). - New columns are highlighted.

Please note that we have sent an instruction for SRE RIN restore(un-retire) and annual compliance reporting re-submission on 8/12/2019.

The refiners have resubmitted the reports with the updated RVO (zero) and deficit (zero) after 8/12.

Please review the table and let me know if you have any questions or concerns.
 I will send a password separately.

Thanks,

Jung

From: Nelson, Karen <nelson.karen@epa.gov>
Sent: Wednesday, November 13, 2019 9:24 AM
To: Kim, Jung <Kim.Jung@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>
Cc: Weihrauch, John <Weihrauch.John@epa.gov>
Subject: RE: help requested: DPP: Memo to the record for the RIN Vintage Letter

I thought that may be the case, particularly for RIN retirement dates. Thanks for adding those in! I do think it will be useful to include those dates the record.

-Karen

From: Kim, Jung <Kim.Jung@epa.gov>

Sent: Wednesday, November 13, 2019 9:10 AM

To: Nelson, Karen <nelson.karen@epa.gov>; Cohen, Janet <cohen.janet@epa.gov>; Larson, Ben <Larson.Ben@epa.gov>; Stahle, Susan <Stahle.Susan@epa.gov>

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Message

From: Ethanol Producer Magazine [noreply@bbiinternational.com]
Sent: 6/23/2020 6:15:28 PM
To: Machiele, Paul [machiele.paul@epa.gov]
Subject: EPA: 52 gap year SRE petitions filed; Bill requires EPA to act on RFS pathway, registration petitions; 1.26 billion RINs generated in May

ETHANOL PRODUCER MAGAZINE'S

Ethanol Week

June 23, 2020



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AUGUST 24-26 2020
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EPA: 52 'gap year' small refinery exemption petitions filed

The U.S. EPA on June 18 released updated small refinery exemption data that shows small refiners have filed 52 "gap year" SRE petitions for RFS compliance years 2011 through 2018 in an effort to circumvent the Tenth Circuit Court's January ruling.

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Bill compels EPA to act on RFS pathway, registration petitions

Sen. John Thune, R-S.D., has introduced a bill that aims to approve certain advanced biofuel registrations under the RFS that the EPA has failed to take action on and set a deadline for the agency to act on future pathway and registration petitions.

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EPA: 1.26 billion RINs generated in May

The U.S. EPA has released renewable identification number (RIN) generation data for May, reporting that nearly 1.26 billion RINs were generated under the RFS during the month, down from 1.72 billion generated during the same month of 2019.

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Industry Events

2020 International Fuel Ethanol Workshop & Expo

August 24-26, 2020
CHI Health Center Omaha
Omaha, Nebraska

Biodiesel Production Technology Summit

August 24-26, 2020
CHI Health Center Omaha
Omaha, Nebraska

Ethanol 101

August 24-24, 2020
CHI Health Center Omaha
Omaha, Nebraska

Biofuels Environmental, Health & Safety Forum

August 24-24, 2020
CHI Health Center Omaha
Omaha, Nebraska

Low Carbon Fuel Production Workshop




CoBank: US ethanol industry will consolidate, diversify

Excess production capacity and reduced demand will force the U.S. ethanol industry to transform its business model to create more value and improve its operational efficiency, according to a new report from CoBank's Knowledge Exchange.

READ MORE SHARE   




NFB: COVID-19 loss to Nebraska ethanol industry could top \$1.3B

Analysis conducted by the Nebraska Farm Bureau indicates the state's agricultural economy could face nearly \$3.7 billion in losses from COVID-19, including a \$1.303 billion loss for the Nebraska ethanol industry.

READ MORE SHARE   

US ethanol production up slightly, weekly ending stocks down 2%

U.S. ethanol production was up slightly the week ending June 12, while weekly ethanol ending stocks were down approximately 2 percent, according to data released by the U.S. Energy Information Administration on June 17.

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EPA appoints Farm, Ranch, and Rural Communities Committee members

The U.S. EPA on June 17 announced the appointment of 33 members to its Farm, Ranch, and Rural Communities Committee, which provides advice and recommendations to the agency on a range of policy issues related to agriculture and rural communities.

READ MORE SHARE   

Trump urged to ensure implementation of China trade agreement

Several biofuel producers and trade groups are among the nearly 200 organizations that sent a letter to President Trump on June 16 calling on him to ensure the continued implementation of the U.S.-China Phase One Trade Agreement.

READ MORE SHARE   

Grassley discusses SRE gap filings, future of RFS program

Sen. Chuck Grassley, R-Iowa, discussed issues related to the post-2022 Renewable Fuel Standard, retroactive small refinery exemptions (SREs), and COVID-19 relief for the ag community during a media call held June 16.

READ MORE SHARE   

House hearing focuses on COVID-19 recovery for energy sector

The House Committee on Energy and Commerce's Subcommittee on Energy held a hearing Jun 16 focused on ways to revive the energy industry, which has been negatively impacted by the COVID-19 pandemic. Biofuels were briefly discussed during the event.

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August 24-24, 2020

CHI Health Center Omaha
Omaha, Nebraska

2020 UAS Summit & Expo

October 13-14, 2020

Alerus Center
Grand Forks, North Dakota

2021 International Biomass Conference & Expo

March 15-17, 2021

Prime F. Osborn III Convention Center
Jacksonville, Florida

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Shift Supervisor

Employer: Al-Corn Clean Fuel, LLC

Environment, Health & Safety (EHS) Manager

Employer: Glacial Lakes Energy, LLC

Ethanol Marketing Manager

Employer: Glacial Lakes Energy, LLC

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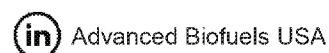
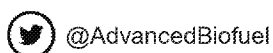
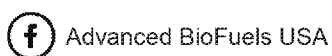
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Message

From: Advanced Biofuels USA Joanne Ivancic [info@advancedbiofuelsusa.org]
Sent: 8/18/2020 3:00:58 PM
To: Machiele, Paul [machiele.paul@epa.gov]
Subject: Latest on Policy, Regulation, Legislation, Litigation for Biofuels, Bioeconomy, Renewable Fuels, Recycling Carbon-August 2020 Advanced Biofuels USA

Hi Paul! Here's your quick August 2020 review of US Legislation, Regulation, Litigation, Policy, Requests for Comment on Federal Regulations. Plus links to International Policy Issues. At your fingertips.

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 - [Federal Litigation](#)
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 - [Advanced Biofuels USA Policy Analyses and Statements](#)
-

2020 Election Activities

Is a month too long to wait? Check our category [2020 Election Activities](#) on your own schedule for Presidential campaigning, as well as House, Senate and local/regional election activities. Also, the category [White House](#) focuses on Presidential involvement with biofuels.

Here are a few examples:

[Dems' Unity Platform: Combat Climate Change, Build Clean Energy Economy, and Environmental Justice](#)

[VP Pence Speech to Farmers Falls Flat](#)

[Biofuel Debate Could Decide Senate Balance of Power](#)

[Joe Biden Picks Kamala Harris as Running Mate and What This Means for Climate in 2020](#)

[Biden Finding Support in Rural America](#)

[Trump Tailors Exaggerations and False Claims to Election Battlegrounds](#)

[Cash-Short U.S. Biofuel Industry Cuts Lobbying even as Iowa Looms Large in Election](#)

[Ag Policy Blog: Ethanol and Politics 2020](#)

[Biofuels Vision 2020 Announces Ad Blitz on EPA Threat to Biofuels](#)

[Inside the DNC's Draft Climate Platform](#)

[The Corn And Energy Price Link Could Tighten As U.S. Election Looms](#)

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Policy: US and International

*There's lots of overlap with policies, legislation, regulations and litigation. Find articles about policy developments in the **US, other countries and states** [here](#). For details, click on the name of the country or state that appears along the right margin of our [website](#). Or click on tags such as:*

[Transportation Fuels Policy](#)

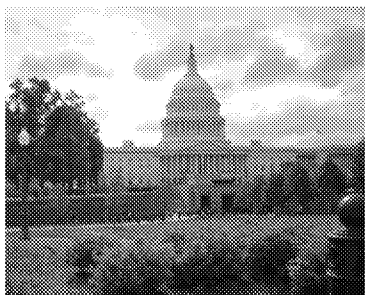
[Energy Policy](#)

[Environmental Policy](#)

[Link to state renewable fuel legislation.](#)

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Federal Legislation



Is a month too long to wait? For up-to-date legislative news (including Executive Orders), [click here](#). Scroll down for Regulations and Litigation news.

[Link to STATE-based renewable fuel legislation.](#)

EPA 'Reset' Recommendation Addresses RFS, LCFS

by Erin Voegele (Ethanol Producer Magazine) A group of six former U.S. EPA administrators representing both republican and democratic administrations are calling for a "reset" of the agency as it approaches its 50th anniversary. The Renewable Fuel Standard and a potential federal Low Carbon Fuel Standard among the issues discussed in a .. August 14, 2020 [Read Full Article](#)

Durbin Introduces Bill To Fund A Clean Climate Future

(Office of Senator Dick Durbin (D-IL)) Today (August 7, 2020), U.S. Senator Dick Durbin (D-IL) announced the introduction of America's Clean Future Fund Act, a bill that would spur job creation by investing in a clean energy economy, achieve critical reductions in greenhouse gas emissions, facilitate a fair transition for workers from ... August 12, 2020 [Read Full Article](#)

ACE: Legislation Would Require EPA to Update GREET

(American Coalition for Ethanol/Ethanol Producer Magazine) Today (August 6, 2020), Sen. John Thune, R-S.D., introduced the Adopt GREET Act, which would require U.S. EPA to update its decade-old greenhouse gas lifecycle modeling for ethanol and biodiesel. American Coalition for Ethanol CEO Brian Jennings issued the following statement in support of ... August 11, 2020 [Read Full Article](#)

Axne: Fossil Fuel Companies Shouldn't Receive Covid Relief Funds

(KMA Land/Iowa Agribusiness Radio Network) ... During a virtual forum with the Iowa Farmers Union on Wednesday, Third District Congresswoman Cindy Axne was asked whether fossil fuel companies should be eligible for pandemic relief funds. "Listen, my personal belief is no," Axne said. "Our fossil fuel companies have been getting handed ... August 8, 2020 [Read Full Article](#)

Building a Biobased Economy: The Digest's 2020 Multi-Slide Guide to BIO in a Post-COVID-19 World

by Jim Lane (Biofuels Digest) At ABLC Digital in July, Stephanie Batchelor, Vice President of the Industrial & Environmental Section at Biotechnology Innovation Organization shared this illuminating slide guide on how BIO is advocating for a resilient future, promoting LCFS in states and sustainable fuels at the federal level, advanced ... August 7, 2020 [Read Full Article](#)

Peterson Working to Make Sure HEROES Act Ag Provisions Make It in Final Bill

by Mark Dorenkamp (Browfield Ag News) House Ag Committee chairman Collin Peterson says he and his colleagues are working to make sure ag provisions included in the HEROES Act are put in the next round of coronavirus relief. "Currently being negotiated now between the White House, the House, and the ... August 6, 2020 [Read Full Article](#)

Climate Crisis Staff Report Aims to Build Back a Cleaner, More Resilient Aviation Sector

by Jeff Overton (Environmental and Energy Study Institute) On June 30, the House Select Committee on the Climate Crisis released its staff report, Solving the Climate Crisis: The Congressional Action Plan for a Clean Energy Economy and a Healthy, Resilient, and Just America. The report is informed by over a year and ... August 5, 2020 [Read Full Article](#)

Murkowski: Carbon Management Has Significant Promise

(U.S. Senate Committee on Energy & Natural Resources) U.S. Senator Lisa Murkowski, R-Alaska, today chaired a hearing focused on the development of carbon removal technologies in the United States. Murkowski also highlighted the introduction of the CREATE Act, a new bill she is cosponsoring to establish an executive committee at the National Science and Technology Council to ... August 5, 2020 [Read Full Article](#)

Border Adjustments in a Carbon Tax

by Shuting Pomerleau (Niskanen Center) The paper reviews the principles of border adjustment, the principal design choices policymakers would face when establishing a border adjustment for a carbon tax, and the implications of different design choices. It also provides a high-level overview of border adjustments proposed in the carbon tax ... August 4, 2020 [Read Full Article](#)

Ernst to EPA: Make E15 Available at Every Pump

by Micheal Clements (NAFB News Service/NewsDakota) Iowa Republican Senator Joni Ernst is calling on the Environmental Protection Agency to make E15 available at every U.S. gas pump. Specifically, Ernst calls on EPA Administrator

Andrew Wheeler to certify biofuel infrastructure for E15 and remove unnecessary labeling which will increase consumer access ... July 31, 2020 [Read Full Article](#)

[Webinar: 95 RON Octane Perspective — Starting the Conversation about a 95 RON Octane Standard](#)

(Urban Air Initiative) This is a conversation related to ethanol and octane. The Urban Air Initiative presents its perspective on a 95 RON Octane Standard and the value it can bring to the corn ethanol industry. Urban Air President Dave VanderGriend and General Motors Biofuel Expert Coleman Jones presented and ... July 29, 2020 [Read Full Article](#)

[U.S. Biofuel Industry May Depend on Agriculture Secretary Perdue for Aid, Senator Says](#)

by Stephanie Kelly (Reuters) The U.S. biofuel industry may have to depend on Agriculture Secretary Sonny Perdue for aid, Senator Chuck Grassley of Iowa said on Tuesday, after Senate Republicans unveiled a coronavirus relief package without specific appropriations for the industry. A provision of the \$1 trillion HEALS Act, introduced ... July 29, 2020 [Read Full Article](#)

[Senate GOP Unveils Coronavirus Relief Package with \\$20B in Ag Aid](#)

by Philip Basher (Agri-Pulse) Senate Republicans unveiled a coronavirus relief package Monday that would give the Agriculture Department broad authority to spend an additional \$20 billion to compensate agricultural producers and processors for the impact of the pandemic. The money would augment the \$14 billion that USDA now has available to ... July 28, 2020 [Read Full Article](#)

Omar, Sanders, Merkley, Markey, Barragán Introduce Bill to End Corporate Handouts to the Fossil Fuel Industry

(Office of Representative Ilhan Omar (D-Minn.)) Rep. Ilhan Omar (D-Minn.) and Sen. Bernie Sanders (I-Vt.) together with Sen. Merkley (D-Ore.), Sen. Markey (D-Mass.) and Rep. Barragan (D-Calif.) introduced legislation to close tax loopholes and eliminate other federal subsidies for the oil, gas, and coal industries. Right now, American taxpayers are ... July 27, 2020 [Read Full Article](#)

Washington Week Ahead: Senate GOP Set to Unveil Pandemic Aid Plan

by Philip Brasher (Agri-Pulse) ... Republicans had hoped to release their plan last Thursday, but (Senate Majority Leader Mitch) McConnell (R-KY) announced instead that leaders of key committees would roll out portions of the plan, expected to cost about \$1 trillion, on Monday. "The sum of these efforts will be ... July 27, 2020 [Read Full Article](#)

In Virtual Hill Visits, RFA Hears from Lawmakers, Administration Officials

(Renewable Fuels Association) The Renewable Fuels Association's summer Board of Directors meeting concluded Wednesday with more than a dozen virtual Capitol Hill visits. Board members had the chance to hear from senators, House members and administration officials. Discussions covered a broad range of topics, including the impact of COVID-19 on ethanol ... July 23, 2020 [Read Full Article](#)

Inside the DNC's Draft Climate Platform

by Kelsey Tamborrino (Politico's Morning Energy) The drafting of the Democratic Party's platform was "the latest front in a tug-of-war between moderates and progressives over the direction and breadth of the party's agenda," POLITICO's

Holly Otterbein reports. A draft of the 80-page platform obtained by POLITICO contains four pages on combating climate change and ... July 23, 2020 [Read Full Article](#)

[The Battle Over 'Clean Energy' Estimates](#)

by Aman Azhar (The Real News) With 17% of US energy jobs gone in the first wave of the COVID-19 pandemic, a recent industry report suggests that over half a million 'clean energy' workers are unemployed despite nationwide efforts to jumpstart the economy. Released by BW Research in partnership with E2 and E4TheFuture, ... July 21, 2020 [Read Full Article](#)

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Federal Regulation



Is a month too long to wait? For up-to-date regulatory news, [click here](#). See also articles in Legislation and Litigation for overlapping topics.

[Biogenic Emissions: Credit Where It's Due](#)

by Luke Geiver (Ethanol Producer Magazine) The push to alter biogenic emissions regulations could boost corn farming and ethanol production while cementing the role of biobased solutions in the fight against climate change. Political inertia, however, remains the primary barrier to change. An improved understanding of biogenic emissions from agricultural ... August 17, 2020 [Read Full Article](#)

Trump Seen Putting Biofuels Decisions on Hold

by Kelsey Tamborrino (Politico's Morning Energy) The Trump administration is likely to wait until after Election Day to weigh in on tough ethanol decisions for fear of triggering backlash among farmers or the oil sector. — ... WAKE ME UP WHEN NOVEMBER ENDS: The Trump administration is expected to punt on tough ... August 17, 2020 [Read Full Article](#)

Corn Growers, Ethanol Supporters to EPA: Stop Penalizing Ethanol Blends

(Urban Air Initiative) The Urban Air Initiative (UAI), a coalition of state corn grower organizations, and the American Coalition for Ethanol, and the Clean Fuels Development Coalition filed comments today asking EPA not to penalize ethanol's ability to reduce carbon emissions. The EPA is proposing to penalize ethanol for its ... August 14, 2020 [Read Full Article](#)

EPA 'Reset' Recommendation Addresses RFS, LCFS

by Erin Voegele (Ethanol Producer Magazine) A group of six former U.S. EPA administrators representing both republican and democratic administrations are calling for a "reset" of the agency as it approaches its 50th anniversary. The Renewable Fuel Standard and a potential federal Low Carbon Fuel Standard among the issues discussed in a ... August 14, 2020 [Read Full Article](#)

Groups Fear 'No Consequences' for Delaying Biofuel Volumes

by Ben Nuelle (Agri-Pulse) Biofuel groups are frustrated election-year politics could be getting in the way of time-sensitive Environmental Protection Agency action on renewable fuel policy that needs to be finalized by the end of the year, and fear

voter accountability in farm country will be lost if the agency delays acting ...

August 12, 2020 [Read Full Article](#)

[EPA's Wheeler Says He Has Questions about SRE Gap Waiver Applications](#)

by Larry Lee (Brownfield Ag News) EPA Administrator Andrew Wheeler said the gap SRE applications have been sent over from the Department of Energy. "They just started sending them to us the week before last, so our guys are just now starting to look at them." Farmers and biofuel producers have ... August 12, 2020 [Read Full Article](#)

[Anniversary Report Details Success of the Renewable Fuel Standard](#)

(Renewable Fuels Association) Commemorating the 15th anniversary of President George W. Bush's signing of the Energy Policy Act of 2005, which created the Renewable Fuel Standard, the Renewable Fuels Association today released a report detailing how the industry has benefited the nation over the past decade and a half. "As you'll see in ... August 6, 2020 [Read Full Article](#)

[CVR Energy Evaluates Renewable Diesel Project at Wynnewood Refinery](#)

by Janet McGurty (S&P Global Platts) Project costs to be recouped by blenders tax credit; Renewable diesel project approval expected in September — CVR Energy is evaluating a renewable diesel project at its Wynnewood, Oklahoma, refinery — the latest refiner seeking respite from rising RINS prices and falling demand for refined products ... August 6, 2020 [Read Full Article](#)

[Ethanol Leaders Urge Noem, Trump to Open Door to "E30 by 2030"](#)

(South Dakota Farmers Union) Compliance with Existing Law Would Inject \$8 Billion Per Year into South Dakota Economy — In a Rapid City Journal ad, a Sioux Falls Argus Leader editorial, and a letter to Governor Kristi Noem, South Dakota ethanol leaders said that a transition to “E30 by 2030 Nationwide” would more than double ... August 5, 2020 [Read Full Article](#)

U.S. Energy Department Recommends Granting Partial Retroactive Waivers to Refiners: Sources

by Stephanie Kelly (Reuters) The U.S. Department of Energy has recommended that some of the oil refiners that applied for retroactive exemptions from the nation’s biofuel blending law be granted partial relief, two sources familiar with the matter said on Tuesday. The move could help bring those refining companies into compliance ... August 5, 2020 [Read Full Article](#)

Growth Energy to IRS: Ethanol Plants Ready to Capture More Carbon

(Growth Energy) Today, Growth Energy CEO Emily Skor submitted written comments on the Internal Revenue Service’s (IRS) proposed regulations under section 45Q, a performance-based tax credit for carbon capture projects. In her letter, Skor called on the agency to offer credit for carbon dioxide captured for food and beverage purposes, which would promote investment in new ... August 4, 2020 [Read Full Article](#)

Turbocharging South Dakota’s Economy while Making Americans Healthier

by Doug Sombke and Jim Seurer (South Dakota Farmers Union/Glacial Lakes Energy/Argus Leader) During President Trump’s Fourth of July visit to Mount Rushmore, our organizations sponsored an ad in the Rapid City Journal that

urged the President to “tear down the wall” that his Environmental Protection Agency (EPA) has unlawfully erected to ... August 3, 2020 [Read Full Article](#)

[RFA Provides USDA a Roadmap to Renewable Fuel Growth](#)

(Renewable Fuels Association) The Renewable Fuels Association this week responded to the U.S. Department of Agriculture's request for comment on its Agriculture Innovation Agenda (AIA). Regarding renewable fuels, the agenda calls for Increased biofuel feedstock production and biofuel production efficiency and competitiveness to achieve market-driven blend rates of E15 in 2030 and E30 ... August 3, 2020 [Read Full Article](#)

[Inside GranBio, NextChem's New Partnership to “Blow Out” Cellulosic Ethanol Global Roll-Out](#)

by Jim Lane (Biofuels Digest) News arrives from Sao Paulo and Rome that GranBio and NextChem have inked a strategic alliance and will co-license GranBio's patented technology for the production of second-generation ethanol. NextChem is a subsidiary of Italian engineering giant Maire Tecnimont dedicated to the energy transition. The news follows ... August 3, 2020 [Read Full Article](#)

[Will Trump's New Investment Proposal Help The Oil & Gas Industry?](#)

by Tsvetana Paraskova (OilPrice.com)The U.S. Department of Labor – which has recently proposed a rule that would limit retirement funds' investments based on environmental, social, and governance (ESG) criteria – is unlikely to incentivize more funds to invest in oil and gas companies, Bloomberg Green Columnist Kate Mackenzie says. At the ... July 31, 2020 [Read Full Article](#)

Federal Activities Report on the Bioeconomy: Algae

(U.S. Department of Energy) ... The Federal Activities Report on the Bioeconomy: Algae is a follow on report to the BR&D Board's Federal Activities Report on the Bioeconomy that summarizes Bioeconomy Initiative activities for the algae stakeholder community. Download the report [Federal Activities Report on the Bioeconomy: Algae](#) ... July 31, 2020 [Read Full Article](#)

Ernst to EPA: Make E15 Available at Every Pump

by Micheal Clements (NAFB News Service/NewsDakota) Iowa Republican Senator Joni Ernst is calling on the Environmental Protection Agency to make E15 available at every U.S. gas pump. Specifically, Ernst calls on EPA Administrator Andrew Wheeler to certify biofuel infrastructure for E15 and remove unnecessary labeling which will increase consumer access ... July 31, 2020 [Read Full Article](#)

U.S. Renewable Energy Numbers Show Strong Progress Towards a Long-Time Goal

(Solutions from the Land) An analysis of data released by the DOE's Energy Information Administration (EIA) that measures the amount of power generated by various resources shows more than 25 percent of the nation's net electrical generation came from renewable sources during the month of May. The percentage is a gratifying number for many involved ... July 30, 2020 [Read Full Article](#)

Webinar: 95 RON Octane Perspective — Starting the Conversation about a 95 RON Octane Standard

(Urban Air Initiative) This is a conversation related to ethanol and octane. The Urban Air Initiative presents its perspective on a 95 RON Octane Standard and the value it can bring to the corn ethanol industry. Urban Air President Dave VanderGriend and General Motors Biofuel Expert Coleman Jones presented and ... July 29, 2020 [Read Full Article](#)

Ernst Urges Wheeler to Take Action on Barriers to E15 Growth

by Erin Voegele (Ethanol Producer Magazine) Sen. Joni Ernst, R-Iowa, sent a letter to U.S. EPA Administrator Andrew Wheeler on July 28 urging him to initiate a rulemaking to certify biofuel infrastructure for E15 and remove unnecessary labeling requirements for the fuel blend. "Two years ago, I worked successfully with ... July 29, 2020 [Read Full Article](#)

Farmers, Researchers Agree: COVID-19, Climate Change Revealed Holes in Agriculture System

by Sarah Spicer (Wichita Eagle) To preserve the environment, mitigate climate change and stabilize the U.S. food system, Midwest farmers should diversify their crops and move away from raising corn and soybeans, researchers say. The current crop system, which was founded after the 1930s Dust Bowl, is causing environmental and economic ... July 29, 2020 [Read Full Article](#)

Growth Energy Champions Biofuels in Comments to USDA

(Growth Energy/Ethanol Producer Magazine) On July 24, Growth Energy CEO Emily Skor submitted comments to the USDA in response to a request for input on the agency's Agriculture Innovation Agenda, a new initiative to promote conservation and boost productivity in American agriculture. In her comments,

Skor applauded the agency's focus on expanding the use of low-carbon ... July 28, 2020 [Read Full Article](#)

In Virtual Hill Visits, RFA Hears from Lawmakers, Administration Officials

(Renewable Fuels Association) The Renewable Fuels Association's summer Board of Directors meeting concluded Wednesday with more than a dozen virtual Capitol Hill visits. Board members had the chance to hear from senators, House members and administration officials. Discussions covered a broad range of topics, including the impact of COVID-19 on ethanol ... July 23, 2020 [Read Full Article](#)

EPA Proposes CO2 Standards for Aircraft PUBLIC COMMENT DEADLINE: TBD

by Kelsey Tamborrino (Politico's Morning Energy) EPA proposed setting fuel efficiency standards for aircraft engines to bring the U.S. in line with rules set by the International Civil Aviation Organization to reduce carbon dioxide, although green groups have long decried the ICAO standards as inadequate to driving down emissions from the aircraft ... July 23, 2020 [Read Full Article](#)

Political Football Season Returns with RFS

by Donnell Rehagen (National Biodiesel Board/Biofuels Digest) ... Once again, the Environmental Protection Agency has turned the RFS into a political football. In June, the agency disclosed it is considering 52 newly filed small refinery exemptions petitions, covering compliance years from 2018 all the way back to 2011. This month, refiners ... July 21, 2020 [Read Full Article](#)

Senators Press USDA for Biofuel Infrastructure Grant Flexibility

(Kansas Ag Connection/US AgNet) U.S. Senators Amy Klobuchar (D-MN) and Tina Smith (D-MN) are pressing U.S. Department of Agriculture (USDA) Secretary Sonny Perdue to allow businesses that have received grants under the Higher Blends Infrastructure Incentive Program (HBIIIP) to use grant funds to cover project costs incurred any time in ... July 17, 2020 [Read Full Article](#)

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Regulations Open for Public Comment



[EPA Proposes CO2 Standards for Aircraft PUBLIC COMMENT DEADLINE: TBD](#)

by Kelsey Tamborrino (Politico's Morning Energy) EPA proposed setting fuel efficiency standards for aircraft engines to bring the U.S. in line with rules set by the International Civil Aviation Organization to reduce carbon dioxide, although green groups have long decried the ICAO standards as inadequate to driving down emissions from the aircraft ... July 23, 2020 [Read Full Article](#)

[USDA Issues Rule to Streamline 4 Loan Guarantee Programs Comments](#)

[DEADLINE: September 14, 2020](#)

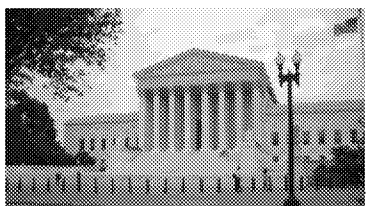
by Erin Voegelé (Biomass Magazine) The USDA on July 13 issued a final rule that aims to increase private investment in rural communities by making it easier for lenders to access four guaranteed loan programs, including the Rural Energy for

America Program. The rule is scheduled to take effect Oct. ... July 15, 2020 [Read Full Article](#)

[MORE OPEN PUBLIC COMMENT REQUESTS](#)

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Federal Litigation



Is a month too long to wait? For up-to-date legislative news, [click here](#). Check Federal Legislation and Federal Regulations above for overlap.

[D.C. Circuit Tosses Biofuel Maker's Complaint that New Guidance Will Cost It Valuable Credits](#)

by Sebastien Malo (Retuers) A federal appeals court on Friday denied a challenge by leading ethanol maker POET Biorefining, LLC who accused the U.S. Environmental Protection Agency of making it impossible to certify its corn-fiber-derived ethanol under a renewable-fuel program. A split three-judge panel of the U.S. Court of Appeals for the ... August 17, 2020 [Read Full Article](#)

[Anti-Subsidy Duties on Indonesian Biodiesel Must Be Revisited](#)

by Brian Flood (Bloomberg Law) Biodiesel imports hit with countervailing duties up to 64.73%; Court faults subsidy finding regarding Indonesia export tariff — The Commerce Department must revisit and possibly lower anti-subsidy duties on

imports of biodiesel from Indonesia, the U.S. Court of International Trade said, questioning whether an Indonesian export ... August 14, 2020 [Read Full Article](#)

Law Firm Investigating Possible Securities Violations by REG

by Ron Kotrba (Biodiesel Magazine) The law firm Lowey Dannenberg P.C. is investigating possible violations of federal securities laws on behalf of investors of Renewable Energy Group Inc. after stock prices fell approximately 20 percent immediately following the company's June 23 announcement that it would revise its expected second quarter adjusted EBITDA from ... August 5, 2020 [Read Full Article](#)

United Refining Sues EPA for Renewable Fuel Exemption (1)

by Maya Earls (Bloomberg Law) The Environmental Protection Agency is failing to act exempting Pennsylvania-based United Refining Co. from the Clean Air Act's renewable fuel standards, the company says in a D.C. federal court lawsuit. The act mandates that fuel sold in the U.S. contain a certain amount of renewable fuel, ... July 23, 2020 [Read Full Article](#)

DOE Still Reviewing Gap-Year Small Oil Refiner Petitions

(Fairfield Sun Times/NAFB) ... (U.S. Energy Secretary Dan) Brouillette argued there were differing legal opinions on the ruling's impact on 'gap-year' waivers, but conceded DOE's method for analyzing and recommending EPA reject the same waivers in earlier years hasn't changed. Which gave (Dave) Loeb sack (D-IA 2nd District) an opening. "Well, ... July 20, 2020 [Read Full Article](#)

EPA Now Considering 58 Gap-Year SRE Requests

(DTN's Washington Insider) At least 58 retroactive small refinery exemption (SRE) requests have been received by the Environmental Protection Agency (EPA), according to the latest update from the agency. The push by refiners for the retroactive "gap-year" exemptions stems from a 10th Circuit Court ruling that held they are only eligible for ... July 17, 2020 [Read Full Article](#)

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By and About Advanced Biofuels USA

For the latest news by and about Advanced Biofuels USA, [click here](#).

"Just a Minute" Educational Series Presents Episode 2 about Making Chemicals from Waste CO2

(Advanced Biofuels USA) The second episode of "Just A Minute or So about Renewable Fuels" focuses on making chemicals from waste CO2 in a circular economy. Students, teachers, or anyone interested in renewables can see in a 3-minute slide presentation narrated by Elizabeth Nesbitt of the U.S. International Trade Commission ... July 22, 2020 [Read Full Article](#)

Advanced Biofuels USA Current Policy Analyses and Suggestions

Links to policy papers, statements and handouts can be found on the Advanced Biofuels USA home page. Or, [READ MORE](#)

For example, a suggestion for taxing the non-renewable part of transportation fuels is [here](#).

Plus, a popular white paper, [How to De-Fossilize Your Fleet: Suggestions for Fleet Managers Working on Sustainability Programs](#).

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Paul: **If you read some of these articles and say to yourself, "That's really important!",** you understand the need for biofuels education. Biofuels is not an easy topic to understand. So, please **share this newsletter**.

Reporters (and those who read their articles and make purchasing and investing decisions based on them) may not have much background in renewable energy or transportation fuels and engines, let alone the intricacies and nuances of the places *where the rubber of policy meets the road of legislation, regulations and litigation*.

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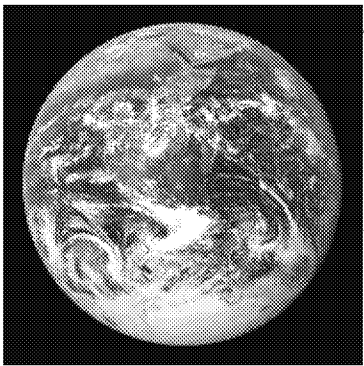
Joanne Ivancic, Executive Director

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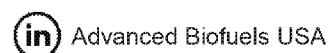
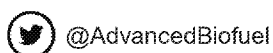
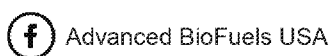
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Message

From: Advanced Biofuels USA Joanne Ivancic [info@advancedbiofuelsusa.org]
Sent: 7/21/2020 6:29:51 PM
To: Machiele, Paul [machiele.paul@epa.gov]
Subject: Latest News on Policy, Regulation, Legislation, Litigation for Biofuels, Bioeconomy, Renewable Fuels, Recycling Carbon-July 2020 Advanced Biofuels USA

Hi Paul! Here's your quick June 2020 review of US Federal Legislation, Regulation, Litigation, Policy, Requests for Comment on Federal Regulations. Plus links to International Policy Issues. At your fingertips.

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2020 Election Activities

Watch our new category [2020 Election Activities](#) for Presidential campaigning, as well as House, Senate and local/regional election activities. Also, the category [White House](#) focuses on Presidential involvement with biofuels.

Here are a few examples:

[COVID-19 Response and November Election: The Digest's 2020 Multi-Slide Guide to 2020 Biofuel Issues to Watch](#)

[Polling Shows Importance of Engaging Ag Leaders In Discussions on Climate Change](#)

[Biden Has a New Climate Road Map. Here's What's Missing](#)

[Our View: Politics: What Rural Areas Need from Legislators](#)

[By Election, Trump Pressures Brazil to Increase Imports of American Ethanol](#)

[Greenfield: Wheeler Must Step Down Immediately](#)

[Biofuel and Oil Seek Federal Help to Deal with Sharp Decline In Production and Prices](#)

[Biofuels Caucus Town Hall Talks Ethanol Issues](#)

[U.S. Biofuel Group in Talks with Biden, Trump Campaigns to Boost Industry](#)

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Policy: US and International

There's lots of overlap with policies, legislation, regulations and litigation. Find articles about [policy developments](#) in the **US, other countries and states** [here](#). For details, click on the name of the country or state that appears along the right margin of our [website](#). Or click on tags such as:

[Transportation Fuels Policy](#)

[Energy Policy](#)

[Environmental Policy](#)

[Link to state renewable fuel legislation.](#)

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Federal Legislation



For more legislative news (including Executive Orders), [click here](#). Scroll down for Regulations and Litigation news.

NEW! [Link to state renewable fuel legislation.](#)

U.S. Iowa Senators Hope to Include Biofuels Aid in Next Coronavirus Relief Package

by Stephanie Kelly (Reuters) U.S. lawmakers from Iowa are trying to add aid for the biofuels industry into a pending coronavirus relief package in the Senate, U.S. Senator Chuck Grassley said on Friday. Grassley and his Iowa colleague, Senator Joni Ernst, hope to include a subsidy for feedstock for the ethanol industry ... July 20, 2020 [Read Full Article](#)

RFA Analysis: Ethanol Industry's COVID-Related Economic Losses Already Top \$3.4 Billion, Could Reach Nearly \$9 Billion by 2021

(Renewable Fuels Association) The COVID-19 crisis has already led to more than \$3.4 billion in lost revenues for the U.S. ethanol industry, according to an economic analysis released today by the Renewable Fuels Association. Based on the latest projections from the Energy Information Administration and the Food and Agriculture Policy Research ... July 17, 2020 [Read Full Article](#)

COVID-19 Response and November Election: The Digest's 2020 Multi-Slide Guide to 2020 Biofuel Issues to Watch

by Jim Lane (Biofuels Digest) Michael McAdams from Advanced Biofuels Association shared this short but illuminating slide guide at ABLC Digital last week to look at the big 2020 issues to watch affecting the biofuels industry. From tax credits, regulatory issues, COVID-19 legislation and responses, and the big fork in ... July 17, 2020 [Read Full Article](#)

Sustainable Aviation Fuel's Affordability: The Digest's 2020 Multi-Slide Guide to Airlines for America's Viewpoint

by Jim Lane (Biofuels Digest) At ABLC last week, Airlines for America's Nancy Young shared this illuminating presentation that outlines what airlines need to deploy sustainable aviation fuel as well as progress, gaps, opportunities and action to scale up supply and commercial viability. Even with COVID-19 impacting airline travel around the ... July 14, 2020 [Read Full Article](#)

Ethanol Prophet Tilts at Petroleum

by Mikkell Pates (AgWeek) South Dakota ethanol promoter Orrie D. Swayze likes to hear promotions for 30% ethanol blends in gasoline but thinks 50% would be better for the environment and human health. — ... Swazey, 76, ... became worried about Middle Eastern oil imports, and thought ethanol made from ... July 13, 2020 [Read Full Article](#)

Bustos Secures Agriculture Wins for Rural America in \$152 Billion Appropriations Bill

(Office of Congresswoman Cheri Bustos (D-IL)) Today, Congresswoman Cheri Bustos (D-IL) helped pass a comprehensive Agriculture and Rural Development funding bill out of the powerful House Appropriations Committee that would deliver more than \$152 billion in agriculture and rural support. "Democrats are building up our rural communities, and this package reflects the critical ... July 13, 2020 [Read Full Article](#)

Takeaways: 10 Big Bioeconomy Trendlines at ABLC for Fuels, Chemicals, Materials, Food and Feed

by Jim Lane (Biofuels Digest) Here are the Top 10 Trendlines we saw and heard from the 8000+ delegates and viewers at ABLC 2020. 1. The thundering herd. One informed firm that does extensive amounts of technology scouting, due diligence and market price forecasting referred to a thundering herd of investors that are ... July 13, 2020 [Read Full Article](#)

Biden Has a New Climate Road Map. Here's What's Missing

by Adam Aton (E&E News) Climate investment goals, green job targets and key decarbonization deadlines were missing from an environmental platform published yesterday by a joint team of Joe Biden backers and Sen. Bernie Sanders supporters. The gaps point to potential sources of liberal conflict next year if Democrats retake control ... July 9, 2020 [Read Full Article](#)

Biofuel Elements of Bipartisan EICDA: The Digest's 2020 Multi-Slide Guide to Energy Innovation & Carbon Dividend Act

by Jim Lane (Biofuels Digest) You've heard of BioPreferred and Renewable Fuel Standard, but what about the Energy Innovation and Carbon Dividend Act? Find out all about EICDA in this slide guide from Business Climate Leaders that was shared at a recent DigestConnect webinar. From how EICDA works like carbon fees ... July 6, 2020 [Read Full Article](#)

Rebuilding Minnesota's Ethanol Industry

by Timothy J. Rudnicki (Minnesota Bio-Fuels Association) ... That is why it is imperative for the Senate to include the financial aid package for the ethanol

industry that was introduced by Sen. Chuck Grassley and Sen. Amy Klobuchar in the next COVID-19 relief bill. While this aid package is much needed ... July 1, 2020 [Read Full Article](#)

[The Congressional Action Plan for a Clean Energy Economy and a Healthy, Resilient, and Just America Majority Staff Report: Is It Worth Supporting?](#)

by Robert Kozak* (Advanced Biofuels USA/Atlantic Biomass, LLC) Today the US House of Representatives Democratic Select Committee on Climate Change released their ideas for a "Clean Energy Economy." Interestingly, this document is not proposed legislation. Instead, it is simply a compilation of potential government programs that are not organized in ... June 30, 2020 [Read Full Article](#)

[Select Committee Democrats Releases 'Solving The Climate Crisis', A Congressional Roadmap For Ambitious Climate Action](#)

(House Select Committee on the Climate Crisis) Plan Would Put Americans Back To Work, Save Lives, And Help the United States Reach Net Zero By 2050 — On Tuesday, led by Speaker Nancy Pelosi and Chair Kathy Castor (D-FL), members of the House Select Committee on the Climate Crisis unveiled a comprehensive plan titled "Solving the ... June 30, 2020 [Read Full Article](#)

[Bamboo Forests in the Desert](#)

David Liepman (Disruptive Nation) ... Strong commercial applications of bamboo include sustainable branded products such as pulp paper, timber, lumber and textiles. And, in line with tissue and textile major brand owner concerns, bamboo is twice as soft as cotton and doesn't require pesticides and fertilizers in its crops. As a ... June 26, 2020 [Read Full Article](#)

Biofuel Groups Urge Congress to Extend Tax Biofuel Credits

by Erin Voegele (Ethanol Producer Magazine) The Advanced Biofuels Business Council, Algae Biomass Organization, Biotechnology Innovation Organization, Growth Energy, National Biodiesel Board and Renewable Fuels Association sent a letter to the House Ways and Means Committee on June 19 expressing support for the proposed extension of tax incentives for advanced biofuels. ... June 26, 2020 [Read Full Article](#)

Republicans Back Bill to Help Oil Sector

by Kelsey Tamborrino (Politico's Morning Energy) REPUBLICANS BACK BILL TO HELP OIL SECTOR: Texas Sen. John Cornyn introduced legislation on Tuesday to help the hard-hit oil sector during the coronavirus pandemic by reducing the royalty rate for payments due from oil, gas, minerals and coal during a national emergency. The bill would also extend the ... June 24, 2020 [Read Full Article](#)

NACSAA Submits Policy Recommendations to Senate Climate Crisis Panel

(North America Climate Smart Agriculture Alliance) The North America Climate Smart Agriculture Alliance (NACSAA) submitted last week a detailed set of policy and program recommendations to the Senate Democrats' Special Committee on the Climate Crisis. The submission, which was made in response to the Committee's request for input from agriculture and ... June 22, 2020 [Read Full Article](#)

Democrats Unveil \$1.5 Trillion Infrastructure Plan

by Rebecca Beitsch (The Hill) House Democrats unveiled a \$1.5 trillion infrastructure plan Thursday that calls for a huge increase in funding to repair roads and bridges while expanding broadband access in rural areas. Democrats described the bill as the biggest legislative effort to fight climate change, with Speaker Nancy Pelosi (D-Calif.) saying ... June 19, 2020 [Read Full Article](#)

Slip-up Reveals Chevron Ties to Architect of Climate Attack

by Corbin Hiar (E&E News) It was an audacious messaging campaign: White environmentalists are hurting black communities by pushing radical climate policies that would strip them of fossil fuel jobs. The email to journalists, sent by a public affairs firm at the height of national protests over systemic racism earlier this ... June 19, 2020 [Read Full Article](#)

Bill Would Push Biofuels Innovation

by Cindy Zimmerman (Energy.AgWired.com) Sen. John Thune (R-SD) has introduced legislation, together with Sen. Jeanne Shaheen (D-NH), to approve some advanced biofuel pathways under the Renewable Fuel Standard, which have been delayed by the Environmental Protection Agency (EPA). Under the legislation, EPA would also be required to render a decision within 90 days on ... June 18, 2020 [Read Full Article](#)

Biofuels Caucus Town Hall Talks Ethanol Issues

by Cindy Zimmerman (Energy.AgWired.com) Members of the Congressional Biofuels Caucus held a virtual town hall Wednesday to discuss the challenges currently facing the ethanol industry and what can be done to help. Participating in the meeting were caucus members including Reps. Collin Peterson (D-MN), Roger

Marshall (R-KS), Dave Loebsack (D-IA), and Rodney Davis ... June 18, 2020 [Read Full Article](#)

[EPA to Propose Splitting 500-Million-Gal RFS Remand in 2021, 2022: Sources](#)

by Jordan Godwin (OPIS) EPA is expected to propose as early as next month a 250-million-gal increase in the 2021 Renewable Volume Obligation (RVO) and another 250-million-gal boost in the 2022 RVO to comply with a remand order the U.S. Court of Appeals for the District of Columbia Circuit issued ... June 17, 2020 [Read Full Article](#)

[Committee Leaders Unveil the INVEST in America Act, a Transformational Surface Transportation Bill to Bring Nation's Infrastructure into a New Era](#)

(U.S. House of Representatives Committee on Transportation and Infrastructure) Chair DeFazio: "The INVEST in America Act is our opportunity to replace the outdated systems of the past with smarter, safer, more resilient infrastructure that fits the economy of the future, creates millions of jobs, supports American manufacturing, and restores U.S. ... June 16, 2020 [Read Full Article](#)

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Federal Regulation



See also articles in Legislation and Litigation for overlapping topics.

DOE Still Reviewing Gap-Year Small Oil Refiner Petitions

(Fairfield Sun Times/NAFB) ... (U.S. Energy Secretary Dan) Brouillette argued there were differing legal opinions on the ruling's impact on 'gap-year' waivers, but conceded DOE's method for analyzing and recommending EPA reject the same waivers in earlier years hasn't changed. Which gave (Dave) Loeb sack (D-IA 2nd District) an opening. "Well, ... July 20, 2020 [Read Full Article](#)

Taking Corn Fiber to the Max — Ethanol Producer Awards: Project of the Year to ACE Ethanol

by Tom Bryan (Ethanol Producer Magazine) When the U.S. EPA approved Ace Ethanol's Part 80 registration for corn-fiber-to-ethanol production this spring—qualifying the facility to generate D3 RINs—it was not just another project milestone, but a critical validation and definitive green light to go. "Securing that D3 approval was never in ... July 17, 2020 [Read Full Article](#)

Senators Press USDA for Biofuel Infrastructure Grant Flexibility

(Kansas Ag Connection/US AgNet) U.S. Senators Amy Klobuchar (D-MN) and Tina Smith (D-MN) are pressing U.S. Department of Agriculture (USDA) Secretary Sonny Perdue to allow businesses that have received grants under the Higher Blends Infrastructure Incentive Program (HBIIP) to use grant funds to cover project costs incurred any time in July 17, 2020 [Read Full Article](#)

EPA Now Considering 58 Gap-Year SRE Requests

(DTN's Washington Insider) At least 58 retroactive small refinery exemption (SRE) requests have been received by the Environmental Protection Agency (EPA), according to the latest update from the agency. The push by refiners for the

retroactive “gap-year” exemptions stems from a 10th Circuit Court ruling that held they are only eligible for ... July 17, 2020 [Read Full Article](#)

[USDA Issues Rule to Streamline 4 Loan Guarantee Programs Comments DEADLINE: September 14, 2020](#)

by Erin Voegele (Biomass Magazine) The USDA on July 13 issued a final rule that aims to increase private investment in rural communities by making it easier for lenders to access four guaranteed loan programs, including the Rural Energy for America Program. The rule is scheduled to take effect Oct. July 15, 2020 [Read Full Article](#)

[Growth Energy Testifies on Low-Carbon Ethanol, EPA Test Fuels](#)

(Growth Energy/Ethanol Producer Magazine) Today (July 13, 2020), Growth Energy Senior Vice President of Regulatory Affairs Chris Bliley offered testimony during a virtual public hearing on the U.S. EPA's test protocols for U.S. fuels. The agency is currently updating Tier 3 Motor Vehicle Emission and Fuel Standards to reflect the modern transition to ... July 14, 2020 [Read Full Article](#)

[Trump Administration Has Been Underestimating Costs of Carbon Pollution, Government Watchdog Finds](#)

by Rebecca Beltsch (The Hill) The Trump administration has been systematically underestimating the damage caused by carbon pollution, slashing figures used under the Obama administration to weigh the impacts of policy, according to a new report from the Government Accountability Office (GAO). The reduced figure, known as the social cost of ... July 14, 2020 [Read Full Article](#)

Feedstock-Conversion Interface Consortium Launches New Website

by Helena Taveras Kennedy (Biofuels Digest) In Washington, D.C., the Feedstock-Conversion Interface Consortium released their revamped website which features renovated content describing the FCIC's eight main research areas. Each research area will enable the consortium to help biorefinery developers understand and mitigate biomass feedstock and process variability. The FCIC develops science-based knowledge ... July 13, 2020 [Read Full Article](#)

Policy and Investment Failures Doomed the Biofuel Revolution

by Todd Woody (Bloomberg Green) To reignite the industry, biofuels need the type of government incentives that allowed solar and wind companies to flourish, analysts say. — ... Technology from Honeywell's subsidiary UOP had refined the camelina into renewable jet fuel, and as we reached cruising altitude executives settled into wide ... July 9, 2020 [Read Full Article](#)

RFA Supports EPA's Proposed 'Anti-Backsliding' Determination, but Says Agency Used 'Outdated and Unreliable' Modeling

(Renewable Fuels Association) In comments submitted today to the Environmental Protection Agency, the Renewable Fuels Association expressed support for the Agency's proposal to determine that no additional measures are necessary to mitigate "potential adverse air quality impacts" associated with the Renewable Fuel Standard. However, RFA's comments also challenged the flawed air ... July 9, 2020 [Read Full Article](#)

Ethanol's Rough 2020 Ride: Trade Wars, COVID-19 and Waivers Alter Its Momentum

by Jennifer M. Latzke (High Plains Journal) ... And still, shortly after Trump's visit, the EPA granted 31 small refinery waivers from the Renewable Fuels Standard in the fall that would have wiped out any traction that year-round E15 approval had gained the industry. Looking back, that was one bump ... July 6, 2020 [Read Full Article](#)

[U.S. EPA Puts 2021 Biofuel Blending Mandate Proposal on Hold Indefinitely, Sources Say](#)

by Stephanie Kelly (Reuters) The U.S. Environmental Protection Agency has put on hold indefinitely a proposal for the amount of biofuels refiners must blend into their fuel next year, two sources familiar with the matter said. Many anticipated the proposal would come out in late June or early July. The EPA ... July 6, 2020 [Read Full Article](#)

[Ethanol Ad Urges Visiting Trump to 'Tear down That \(Blend\)' Wall'](#)

by Mikkell Pates (Ag Week) Ethanol proponents try to make some political hay with President Donald Trump when he visits Rapid City. They ask that he "tear down that wall" of 10% ethanol blends, and allow ethanol to climb to 30% blends. They say the Environmental Protection Agency should do ... July 3, 2020 [Read Full Article](#)

[Potential Feedstocks, Biofuel Markets, Corn and Cellulosic Ethanol: The Digest's 2020 Multi-Slide Guide to Increasing Feedstock Production for Biofuels](#)

by Jim Lane (Biofuels Digest)The Biomass Research and Development Board published a report that looks at how to address the constraints surrounding availability of biomass feedstocks for biofuels. Four questions guide the analysis:

What feedstocks and at what price? What is the regional distribution of feedstock production? What are the ... July 3, 2020 [Read Full Article](#)

Sen. Cruz to EPA: No Relief for Refinery Workers, No Consent for EPA Nominee

(Office of Senator Ted Cruz (R-TX)) U.S. Sen. Ted Cruz (R-Texas) today issued the following statement on the nomination of Doug Benevento to be Deputy Administrator of the U.S. Environmental Protection Agency (EPA): "The price of RINs has more than quadrupled since the beginning of the year, and now sits around ... July 2, 2020 [Read Full Article](#)

John J. Mooney: An Appreciation of Performance Directed Engineering Greatness

by Robert Kozak* (Atlantic Biomass/Advanced Biofuels USA) I was sad to see an obituary today for the great engineer John J. Mooney. Who was John J. Mooney you ask? He was the co-inventor of both the 2-way and the 3-way motor vehicle catalytic converter. The "3-way cat," as it is referred ... July 1, 2020 [Read Full Article](#)

More Evidence of Causal Link between Air Pollution and Early Death

(Harvard T.H. Chan School of Public Health) Strengthening U.S. air quality standards for fine particulate pollution to be in compliance with current World Health Association (WHO) guidelines could save more than 140,000 lives over the course of a decade, according to a new study from Harvard T.H. Chan School of Public Health. The study, ... July 1, 2020 [Read Full Article](#)

Review of the National Ambient Air Quality Standards for Particulate Matter on Behalf of the Urban Air Initiative (UAI)

(Urban Air Initiative) On behalf of the Urban Air Initiative (UAI), we appreciate the opportunity to comment on the above Proposed Rulemaking (Docket ID No. EPA-HQ-OAR-2015-0072). UAI is a not for profit technical organization with a particular focus on automotive emissions and fuel composition. We are disappointed that EPA fails ... July 1, 2020 [Read Full Article](#)

Covid-19 Fears Spur More Cars on Roads, Threatening Air Quality

by Amena H. Saiyid with assistance from Sylvia Carignan and Christina Brady (Bloomberg Law) Some who normally use mass transit seek safer commute option; State, local officials watch data for air quality impact — ... More cars on the roads in congested urban centers like New York City—the virus epicenter ... July 1, 2020 [Read Full Article](#)

Farming, Biofuels, Health Groups Challenge EPA on SAFE Rule

(Morning Ag Clips/South Dakota Farmers Union) Broad coalition challenges the Safer Affordable Fuel Efficiency Vehicle Rule; In response to EPA's failure to credibly consider and advance mid-level ethanol fuel blends as an alternative to conventional fuels, the groups filed a petition for review in the Superior Court of the District ... June 30, 2020 [Read Full Article](#)

EPA to Propose Splitting 500-Million-Gal RFS Remand in 2021, 2022: Sources

by Jordan Godwin (OPIS/Governors Biofuels Coalition) EPA is expected to propose as early as next month a 250-million-gal increase in the 2021 Renewable Volume Obligation (RVO) and another 250-million-gal boost in the 2022 RVO to comply

with a remand order the U.S. Court of Appeals for the District of Columbia Circuit
... June 30, 2020 [Read Full Article](#)

CEO Reflects on Ethanol Industry Crises a Year after Trump Visit

by Glenn Minnis (The Center Square) ... The president was there to help industry executives celebrate his administration's removal of a regulation that up until then prohibited companies from selling gasoline containing 15% ethanol year-round. "It was a terrific event for my company and the renewable fuels industry, drawing nearly ... June 25, 2020 [Read Full Article](#)

Greenfield: Wheeler Must Step Down Immediately

by Paul Deaton (Blog for Iowa) At a June 22 press conference U.S. Senate candidate Theresa Greenfield said since Joni Ernst hasn't called for the resignation of U.S. Environmental Protection Agency Administrator Andrew Wheeler over 52 new Renewable Fuel Standard waivers she will. And she did. ... Today, businesswoman and ... June 23, 2020 [Read Full Article](#)

52 Petitions Filed by Refineries Seeking RFS Exemptions

(Renewable Fuels Association/National Biodiesel Board/Farm Progress) Renewable Fuels Association, National Biodiesel Board critical of these petitions, say refiners are trying to circumvent court ruling. — The U.S. Environmental Protection Agency today disclosed that 52 new petitions have been received from small refineries seeking retroactive exemptions from their Renewable Fuel Standard requirements ... June 19, 2020 [Read Full Article](#)

Biofuel and Oil Seek Federal Help to Deal with Sharp Decline In Production and Prices

(RFD TV) ... Both the oil and ethanol sectors are asking the federal government to step in as each one sees a sharp decline in prices and production. Oil groups say that the pandemic pushed the industry over the edge, while it was battling an already downward demand trend. ... June 18, 2020 [Read Full Article](#)

Solutions from the Land's Letter to Senate Democrats' Special Committee on the Climate Crisis

(Solutions from the Land) In response to a call for input from the Senate Democrats' Special Committee on the Climate Crisis for input on tools, programs, and support useful to address the impacts of severe weather and climate change on their community and business, we have constructed a response ... June 17, 2020 [Read Full Article](#)

Grassley Says RFS Debate Could Explode Come 2022

by Marc Heller (E&E News) If the politics around ethanol seem charged today, just wait two years — that's when Congress may really step into the fray. [READ MORE](#) Grassley discusses SRE gap filings, future of RFS program (Ethanol Producer Magazine) Excerpt from Ethanol Producer Magazine: In the legislation that ... June 17, 2020 [Read Full Article](#)

EPA to Propose Splitting 500-Million-Gal RFS Remand in 2021, 2022: Sources

by Jordan Godwin (OPIS) EPA is expected to propose as early as next month a 250-million-gal increase in the 2021 Renewable Volume Obligation (RVO) and another 250-million-gal boost in the 2022 RVO to comply with a remand order the

U.S. Court of Appeals for the District of Columbia Circuit issued .. June 17, 2020 [Read Full Article](#)

Validating the Need to Test Real-World Fuels

by Steve VanderGriend (Ethanol Producer Magazine/Urban Air Initiative) While much of the industry's energy has been focused on issues like Reid vapor pressure relief, a new technical paper demonstrates the need to focus on aromatics, and the fact that ethanol can reduce the need for other carcinogenic octane enhancers. ... June 17, 2020 [Read Full Article](#)

Ethanol's Carbon Underground

by Luke Geiver (Ethanol Producer Magazine) Positioning into the low-carbon biofuels marketplace, ethanol producers are moving forward with sequestration strategies. A more lucrative federal tax credit, along with a reduced minimum production requirement, is making the economics attractive. After more than 20 years of research, sponsored largely by the U.S. ... June 16, 2020 [Read Full Article](#)

EPA Proposes Honest Accounting Standard to Improve Future Clean Air Act Rules PUBLIC COMMENT DEADLINE: July 27, 2020

(Environmental Protection Agency) Today (June 4, 2020), the U.S. Environmental Protection Agency (EPA) issued a proposal to improve the rulemaking process under the Clean Air Act by establishing requirements to ensure consistent, high-quality analyses of benefits and costs are provided to the public for significant rules. This proposal, when finalized, will ... June 16, 2020 [Read Full Article](#)

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Regulations Open for Public Comment



[EPA Proposes Honest Accounting Standard to Improve
Future Clean Air Act Rules PUBLIC COMMENT DEADLINE:
July 27, 2020](#)

(Environmental Protection Agency) Today (June 4, 2020),
the U.S. Environmental Protection Agency (EPA) issued a
proposal to improve the rulemaking process ... [Read Full Article](#)

[Solicitation of Input From Stakeholders on Agricultural Innovations DEADLINE
August 1, 2020](#)

(U.S. Department of Agriculture/Federal Register) The United States Department
of Agriculture (USDA) is soliciting comments and suggestions on objectives and
opportunities leading to research goals and informed product goals to facilitate
transformative breakthroughs to enable U.S. agriculture to meet the Department's
goal of increasing agricultural production by 40 percent to ... [Read Full Article](#)

Godot Arrives: Carbon Capture Regs Released Public Comment DEADLINE:
August 3, 2020

by Kelsey Tamborrino (Politico's Morning Energy) The IRS on Thursday released proposed rules for an expanded carbon capture and utilization tax credit, ending a more than two-year wait for the regulations. Congress expanded the carbon capture credit in early 2018 as part of a bill that funded the government, but ... [Read Full Article](#)

Notice of Proposed Rulemaking: Vehicle Test Procedure Adjustments for Tier 3
Certification Test Fuel DEADLINE: August 11, 2020

(U.S. Environmental Protection Agency) The Environmental Protection Agency (EPA) is proposing to make adjustments to certain laboratory tailpipe emission testing procedures for automobiles, light trucks, and heavy-duty pickup trucks and vans as the result of a test fuel change that was finalized as a part of EPA's 2014 Tier 3 vehicle emissions ... [Read Full Article](#)

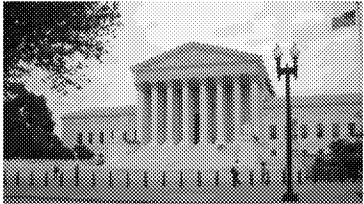
USDA Issues Rule to Streamline 4 Loan Guarantee Programs Comments
DEADLINE: September 14, 2020

by Erin Voegelé (Biomass Magazine) The USDA on July 13 issued a final rule that aims to increase private investment in rural communities by making it easier for lenders to access four guaranteed loan programs, including the Rural Energy for America Program. The rule is scheduled to take effect Oct. ... July 15, 2020 [Read Full Article](#)

MORE OPEN PUBLIC COMMENT REQUESTS

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Federal Litigation



Check Federal Legislation and Federal Regulations for overlap. For more on federal litigation, [click here](#).

[Green Plains Sues ADM, Alleging Ethanol Market Manipulation](#)

by P.J. Huffstutter (Reuters) Green Plains Inc, one of the biggest U.S. ethanol producers, sued Archer Daniels Midland Co on Tuesday, accusing the global grain trader of manipulating the price of the biofuel to profit from its positions in the derivatives market. Green Plains filed the proposed class action with ... July 15, 2020 [Read Full Article](#)

[DOJ Asks Court to Block Automakers from Suit](#)

by Kelsey Tamborrino (Politico's Morning Energy) The Trump administration on Thursday asked a court to block Ford, Honda, Volkswagen and BMW from becoming directly involved with litigation over the SAFE Vehicles rule (Reg. 2060-AU09). The automakers, which struck a voluntary emissions deal with California, last week moved to join the ... July 10, 2020 [Read Full Article](#)

[Weighing in: A Bipartisan Group of Former EPA and Transportation Department Chiefs Filed a Friend-of-the-Court Brief](#)

by Kelsey Tamborrino (Politico's Morning Energy) A bipartisan group of former EPA and Transportation Department chiefs filed a friend-of-the-court brief this week criticizing the Trump administration's revocation of California's fuel economy

waiver as having no “no valid legal, factual, or logical basis,” Alex also reports for Pros. The Trump administration ... July 8, 2020 [Read Full Article](#)

[Farming, Biofuels, Health Groups Challenge EPA on SAFE Rule](#)

(Morning Ag Clips/South Dakota Farmers Union) Broad coalition challenges the Safer Affordable Fuel Efficiency Vehicle Rule; In response to EPA's failure to credibly consider and advance mid-level ethanol fuel blends as an alternative to conventional fuels, the groups filed a petition for review in the Superior Court of the District ... June 30, 2020 [Read Full Article](#)

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[Date Set for Oral Arguments in Small Refinery Exemption RFS Case](#)

by Kelsey Tamborrino (Politico's Morning Energy) The D.C. Circuit Court of Appeals will hear oral arguments on Sept. 25 in a case that could determine whether EPA must deeply curtail its program of exemptions from the RFS. The case mirrors a 10th Circuit case in which the court found that ... June 18, 2020 [Read Full Article](#)

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By and About Advanced Biofuels USA

For the latest news by and about Advanced Biofuels USA, [click here](#).

John J. Mooney: An Appreciation of Performance Directed Engineering Greatness

by Robert Kozak* (Atlantic Biomass/Advanced Biofuels USA) I was sad to see an obituary today for the great engineer John J. Mooney. Who was John J. Mooney you ask? He was the co-inventor of both the 2-way and the 3-way motor vehicle catalytic converter. The "3-way cat," as it is referred ... July 1, 2020 [Read Full Article](#)

Goiás State in Brazil Approves "When Filling Your Tank, Choose Ethanol" Policy

by André Luiz Cançado Motta* (Federal University of Goiás for Advanced Biofuels USA) The President of the Legislative Assembly of the State of Goiás, Deputy Lissauer Vieira (PSB, the Brazilian Socialist Party), approved, on June 18, at the Remote Ordinary Session, with 25 votes in favor and none against, the new State Policy ... June 25, 2020 [Read Full Article](#)

The Importance of Renewable Fuels and Their Different Processes

by Pedro Malpartida* (Advanced Biofuels USA) This paper, prepared in partial completion of graduation requirements at George Mason University, presents information about the topic of biofuels and renewable fuels and the different processes, which were studied as part of an internship with Advanced Biofuels USA. This paper summarizes information learned ... June 19, 2020 [Read Full Article](#)

Advanced Biofuels USA Publishes Updated "What's the Difference between Biodiesel and Renewable (Green) Diesel?" Adds "What Renewable Fuels Can Be Used in Compression Ignition Engines?"

(Advanced Biofuels USA) Since 2011, one of Advanced Biofuels USA's most popular publications has been "What's the Difference between Biodiesel and Renewable (Green) Diesel?" The update of this paper has been expanded to answer the question, "What Renewable Fuels Can Be Used in Compression Ignition Engines?" This paper begins by ... June 8, 2020 [Read Full Article](#)

Advanced Biofuels USA Current Policy Analyses and Suggestions

Links to policy papers, statements and handouts can be found on the Advanced Biofuels USA home page. Or, [READ MORE](#)

For example, a suggestion for taxing the non-renewable part of transportation fuels is [here](#).

Plus, a popular white paper, [How to De-Fossilize Your Fleet: Suggestions for Fleet Managers Working on Sustainability Programs](#).

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Paul: **If you read some of these articles and say to yourself, "That's really important!",** you understand the need for biofuels education. Biofuels is not an easy topic to understand. So, please **share this newsletter**.

Reporters (and those who read their articles and make purchasing and investing decisions based on them) may not have much background in renewable energy or

transportation fuels and engines, let alone the intricacies and nuances of the places *where the rubber of policy meets the road of legislation, regulations and litigation.*

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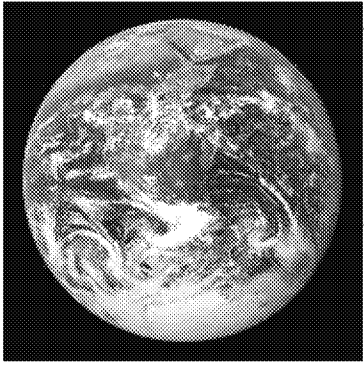
Thanks,

Joanne Ivancic, Executive Director

EDUCATION NEWSLETTER, too! Advanced Biofuels USA sends three newsletters: *Conference Calendar; Policy, Legislation, Regulations, Happenings; and a NEW Education Newsletter.* All can be found archived on our [NEWS page](#). **And** [Click HERE to Subscribe to the new Education Newsletter \(Free\).](#)

Watch for it the first week of each month. Watch for the policy newsletter and conference calendar the third week of each month.

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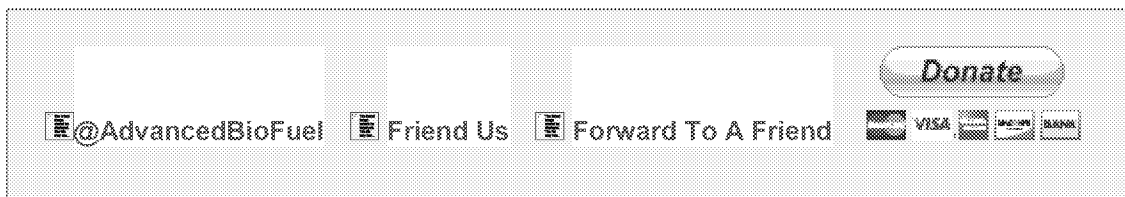
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Request Details
Request Type : FOIA
Status : Assignment Determination **Due Date : 06/07/2018**
 5

Request Details

Tracking Number : EPA-HQ-2018-007467	Submitted Date : 05/08/2018
Requester : Mr. Michael J. McAdams	Perfected Date : 05/09/2018
Organization : Advanced Biofuels Association	Last Assigned Date : 05/09/2018
Requester Has Account : No	Fee Limit : \$500.00
Email Address : Michael.McAdams@hklaw.com	Request Track : Simple
Phone Number : 202-469-5140	Due Date : 06/07/2018
Fax Number : N/A	Assigned To : Office of Transportation and Air Quality
Address : Holland & Knight LLP 800 17th Street NW, Suite 1100 City : Washington State/Province : DC Zip Code/Postal Code : 20006	Last Assigned By : Sabrina Hamilton (Immediate Office)

Submission Details
Request Handling

Requester Info Available to Yes the Public :	Request Perfected : Yes
Request Track : Simple	Perfected Date : 05/09/2018
Fee Category : Commercial	Acknowledgement Sent Date:
Fee Waiver Requested: No	Unusual Circumstances ? : No
Fee Waiver Status: N/A	5 Day Notifications: No
Expedited Processing No Requested :	Litigation : No
Expedited Processing Status : N/A	* Litigation Court Docket Number :

Request Description

Short Description : N/A

I am requesting the following information and documents from EPA: 1) FOIA request No. EPA-HQ-2018-006291 submitted by the Renewable Fuels Association on April 5, 2018. I request that you please forward all documents responsive to this FOIA request to my attention. Please provide all responsive documents to me in the same format made available to the requestors. 2) Any and all petitions, for any and all years, for exemptions under the small refinery hardship authorities submitted by entities requesting relief under the authorities. 3) Any and all documents or communications and attachments thereto reflecting any made changes to the criteria threshold, application of the criteria, interpretation of the criteria, or methodology for calculating compliance with the criteria used to determine whether a small refinery has demonstrated disproportionate economic hardship and is therefore eligible to receive a small refinery exemption, including but not limited to changes to the percentage of total criteria that a small refinery must meet in order to qualify for an exemption. For example, documents showing that a refinery must satisfy 50 percent of the applicable criteria to qualify for an exemption, compared to a previous threshold of 75 percent, would be responsive to this request. 4) Any and all reports submitted by EPA to the U.S. House of Representatives Committee on Appropriation or the U.S. Senate Committee on Appropriations regarding EPA's disagreement with a Department of Energy recommendation on a small refinery exemption. 5) Any and all documents or communications and attachments thereto regarding how far back in time EPA believes it can grant small refinery exemptions. 6) Any and all documents regarding the legal and compliance status of previously retired renewable identification numbers that a small refinery previously used to satisfy its obligations under the renewable fuel standard program once that small refinery receives a retroactive exemption.

Description Available to the Yes

Has Description Been No

May 8, 2018

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

RE: Freedom of Information Act ("FOIA") Request for Small Refinery Disproportionate
Economic Hardship Exemption Materials

Dear FOIA Officer:

On April 26, 2018, the Administrator of the Environmental Protection Agency ("EPA"), Scott Pruitt, testified in a hearing before the Environmental Subcommittee of the House of Representatives' Energy and Commerce Committee. Administrator Pruitt testified that in 2017, EPA received 24 retroactive applications from refineries seeking small refinery exemptions from the Clean Air Act's renewable fuel standards program pursuant to 42 U.S.C. § 7545(o)(9). Mr. Pruitt also testified that EPA has received more than 30 retroactive applications for small refinery exemptions so far in 2018. Recent news reports indicate that EPA has issued as many as 25 small refinery exemptions thus far in 2018.¹

Accordingly, I am requesting under FOIA² the following information and documents from EPA, including but not limited to communications to or from Scott Pruitt, EPA Administrator; Bill Wehrum, Assistant Administrator of EPA's Office of Air and Radiation; Christopher Grundler, Director of EPA's Office of Transportation and Air Quality ("OTAQ"); Byron Bunker, Director of the Compliance Division of EPA's OTAQ; Mandy Gunasekara of the EPA Office of Air and Radiation; Benjamin Hengst, Associate Director, OTAQ; Paul Argyropoulos, formerly of the EPA OTAQ; and all EPA staff involved in the review of petitions for small refinery exemptions:

- EPA's database indicates that EPA is processing FOIA request No. EPA-HQ-2018-006291 submitted by the Renewable Fuels Association on April 5, 2018. Pursuant to 5 U.S.C. § 552 *et seq.* and 40 C.F.R. § 2.100 *et seq.*, I request that you please forward all documents responsive to this FOIA request to my attention. Please provide all responsive documents to me in the same format made available to the requestors.

In addition to the materials requested by FOIA request No. No. EPA-HQ-2018-006291, I request that you provide the following:

- Any and all petitions, for any and all years, for exemptions under the small refinery hardship authorities submitted by entities requesting relief under the authorities.

¹ Jarrett Renshaw, Chris Prentice, *U.S. Ethanol Groups Bristle as EPA Frees Refiners from Biofuels Law*, Reuters (Apr. 4, 2018), <https://www.reuters.com/article/us-usa-biofuels-epa-refineries/u-s-ethanol-groups-bristle-as-epa-frees-refiners-from-biofuels-law-idUSKCN1HB2AH>.

² 5 U.S.C. § 552 *et seq.*

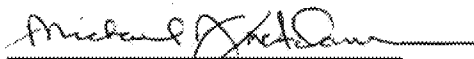
FOIA Officer
May 8, 2018
Page 2

- Any and all documents or communications and attachments thereto reflecting any made changes to the criteria threshold, application of the criteria, interpretation of the criteria, or methodology for calculating compliance with the criteria used to determine whether a small refinery has demonstrated disproportionate economic hardship and is therefore eligible to receive a small refinery exemption, including but not limited to changes to the percentage of total criteria that a small refinery must meet in order to qualify for an exemption. For example, documents showing that a refinery must satisfy 50 percent of the applicable criteria to qualify for an exemption, compared to a previous threshold of 75 percent, would be responsive to this request.
- Any and all reports submitted by EPA to the U.S. House of Representatives Committee on Appropriation or the U.S. Senate Committee on Appropriations regarding EPA's disagreement with a Department of Energy recommendation on a small refinery exemption.
- Any and all documents or communications and attachments thereto regarding how far back in time EPA believes it can grant small refinery exemptions.
- Any and all documents regarding the legal and compliance status of previously retired renewable identification numbers ("RINs") that a small refinery previously used to satisfy its obligations under the Renewable Fuel Standard Program once that small refinery receives a retroactive small refinery exemption.

I am requesting that materials be provided to me on computer files or, if not maintained on computer files, in the same format as they are currently maintained at EPA. I agree to pay reasonable fees for the materials I have requested; including actual costs up to \$500. If you estimate that actual costs will exceed \$500, please contact me so that I may arrange for payment. If documents are withheld entirely, I would kindly request that EPA: identify, at the time of document production, any and all material that is withheld; provide a justification for withholding the information, pursuant to 5 U.S.C. § 552(a)(6); and identify the exemption that EPA believes allows the withholding of the requested information.

If you have any questions about this request, please feel free to contact me at Michael.McAdams@hklaw.com or 202-469-5140.

Sincerely,



Michael J. McAdams,
President
Advanced Biofuels Association

Appointment

From: O'Donnell, Jessica (ENRD) [Jessica.O'Donnell@usdoj.gov]
Sent: 10/21/2019 1:35:05 PM
To: O'Donnell, Jessica (ENRD) [Jessica.O'Donnell@usdoj.gov]; Srinivasan, Gautam [Srinivasan.Gautam@epa.gov]; Stahle, Susan [Stahle.Orlin.David@epa.gov]; Jacobi, Patrick R. (ENRD) [Patrick.R.Jacobi@usdoj.gov]; Hostetler, Eric (ENRD) [Eric.Hostetler@usdoj.gov]; [Jon.Lipshultz@usdoj.gov]; Grishaw, Letitia (ENRD) [Letitia.Grishaw@usdoj.gov]; Brightbill, Jonathan (ENRD) [Jonathan.Brightbill@usdoj.gov]; Briana.Elias@usdoj.gov]; Clinnin, Susan (ENRD) [Susan.Clinnin@usdoj.gov]; Rogers, Cherie (ENRD) [Cherie.Rogers@usdoj.gov]; J [Jhana.L.Baskett@usdoj.gov]; Spence, Samara (ENRD) [Samara.Spence@usdoj.gov]; Do, John Thomas (ENRD) [John.Do@usdoj.gov]; [Meghan.Greenfield@usdoj.gov]
CC: Dubey, Susmita [dubey.susmita@epa.gov]; Nelson, Karen [nelson.karen@epa.gov]; Michaels, Lauren [Michaels.Lauren@epa.gov]; [Hengst.Benjamin@epa.gov]

Subject: FW: Moot court: Advanced Biofuels Ass'n v. EPA (DC Cir)

Attachments: ENV_DEFENSE-#879685-v1-advanced_biofuels_28(j)_letter_citing_Aug_9_decision.PDF; ENV_DEFENSE-#872080-v1-DN_1796068_APPELLEE_FINAL_BRIEF__1796068__filed_by_EPA_and_Andrew_Wheeler__Service_Date__07_08_2019__Length_1115__(O_D.PDF; ENV_DEFENSE-#871340-v1-DN_1794504_INTERVENOR_FOR_APPELLEE_FINAL_BRIEF__1794504__filed_by_HollyFrontier_Refining_&_Marketing_LLC__Service_Date__06_25_2019__Length_1115__(O_D.PDF; ENV_DEFENSE-#871338-v1-DN_1794498_APPELLANT_FINAL_REPLY_BRIEF__1794498__filed_by_Advanced_Biofuels_Association__Service_Date__06_25_2019__Length_1115__(O_D.PDF; ENV_DEFENSE-#871185-v1-DN_1794208_RESPONSE__1794208__to_letter_Rule_28j_authorities__1794009-2__letter__1794009-3__filed_by_Advanced_Biofuels_Association__Service_Date__06_25_2019__Length_1115__(O_D.PDF; ENV_DEFENSE-#871142-v1-DN_1794009_LETTER__1794009__pursuant_to_FRAP_28j_advising_of_additional_authorities_filed_by_EPA_and_Andrew_Wheeler__Service_Date__06_25_2019__Length_1115__(O_D.PDF; ABFA Final Opening Brief 6-25-2019 Under Seal Version.pdf

Location: 4CON 4.1109

Start: 10/22/2019 7:30:00 PM

End: 10/22/2019 9:30:00 PM

Show Time Tentative

As:

-----Original Appointment-----

From: O'Donnell, Jessica (ENRD) <Jessica.O'Donnell@usdoj.gov>

Sent: Thursday, August 22, 2019 10:23 AM

To: O'Donnell, Jessica (ENRD); Stahle, Susan; Orlin, David; Jacobi, Patrick R. (ENRD); Hostetler, Eric (ENRD); Lipshultz, Jon (ENRD); Grishaw, Letitia (ENRD); Brightbill, Jonathan (ENRD); Elias, Briana (ENRD); Clinnin, Susan (ENRD); Rogers, Cherie (ENRD); Jhana.L.Baskett@USDOJ.gov; Spence, Samara (ENRD); Do, John Thomas (ENRD); Meghan Greenfield

Cc: Dubey, Susmita; Nelson, Karen; Michaels, Lauren; Hengst, Benjamin

Subject: Moot court: Advanced Biofuels Ass'n v. EPA (DC Cir)

When: Tuesday, October 22, 2019 3:30 PM-5:30 PM (UTC-05:00) Eastern Time (US & Canada).

Where: 4CON 4.1109

All – the briefs for this moot are attached. I'm also circulating a few 28(j) letters that were submitted to the court.

All – the court has scheduled oral argument in the above-referenced case for Friday, October 25, 2019. I'm proposing a moot court at the above-noted time and date. Please let me know if this time/date poses a problem for you. Otherwise, I'll circulate the briefs about a week in advance.

Sue – please feel free to circulate more broadly within EPA, as appropriate. If you could just let me know about a week before who EPA’s in-person attendees are, I would appreciate it.

For anyone wanting to participate by phone, please use this number:

Ex. 6 Personal Privacy (PP)

Thanks,
Jessica

Appointment

From: Stahle, Susan [Stahle.Susan@epa.gov]
Sent: 10/21/2019 1:34:57 PM
To: Srinivasan, Gautam [Srinivasan.Gautam@epa.gov]

Subject: FW: Moot court: Advanced Biofuels Ass'n v. EPA (DC Cir)

Attachments: ENV_DEFENSE-#879685-v1-advanced_biofuels_28(j)_letter_citing_Aug_9_decision.PDF; ENV_DEFENSE-#872080-v1-DN_1796068_APPELLEE_FINAL_BRIEF__1796068__filed_by_EPA_and_Andrew_Wheeler__Service_Date__07_08_2019__Length_1115__(O.D.PDF; ENV_DEFENSE-#871340-v1-DN_1794504_INTERVENOR_FOR_APPELLEE_FINAL_BRIEF__1794504__filed_by_HollyFrontier_Refining_&_Marketing_LLC__Service_Date__07_08_2019__Length_1115__(O.D.PDF; ENV_DEFENSE-#871338-v1-DN_1794498_APPELLANT_FINAL_REPLY_BRIEF__1794498__filed_by_Advanced_Biofuels_Association__Service_Date__06_25_2019__Length_1115__(O.D.PDF; ENV_DEFENSE-#871185-v1-DN_1794208_RESPONSE__1794208__to_letter_Rule_28j_authorities__1794009-2__letter__1794009-2__filed_by_Advanced_Biofuels_Association__Service_Date__06_25_2019__Length_1115__(O.D.PDF; ENV_DEFENSE-#871142-v1-DN_1794009_LETTER__1794009__pursuant_to_FRAP_28j_advising_of_additional_authorities_filed_by_EPA_and_Andrew_Wheeler__Service_Date__06_25_2019__Length_1115__(O.D.PDF; ABFA Final Opening Brief 6-25-2019 Under Seal Version.pdf

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Sent: Thursday, August 22, 2019 10:23 AM

To: O'Donnell, Jessica (ENRD); Stahle, Susan; Orlin, David; Jacobi, Patrick R. (ENRD); Hostetler, Eric (ENRD); Lipshultz, Jon (ENRD); Grishaw, Letitia (ENRD); Brightbill, Jonathan (ENRD); Elias, Briana (ENRD); Clinnin, Susan (ENRD); Rogers, Cherie (ENRD); Jhana.L.Baskett@USDOJ.gov; Spence, Samara (ENRD); Do, John Thomas (ENRD); Meghan Greenfield

Cc: Dubey, Susmita; Nelson, Karen; Michaels, Lauren; Hengst, Benjamin

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For anyone wanting to participate by phone, please use this number:

Ex. 6 Personal Privacy (PP)

Thanks,
Jessica

Message

From: O'Donnell, Jessica (ENRD) [Jessica.O'Donnell@usdoj.gov]
Sent: 8/6/2019 8:18:00 PM
To: Stahle, Susan [Stahle.Susan@epa.gov]
Subject: FW: Advanced Biofuels v. EPA (DC Cir.)
Attachments: ABFA Final Opening Brief 6-25-2019 Under Seal Version.pdf

Hi Sue - I'm not sure I sent you a copy of the unredacted, sealed version of petitioner's final opening brief. So here it is.

Thanks,
 Jessica

Jessica O'Donnell
 Assistant Section Chief
 Environmental Defense Section
 202.305.0851

-----Original Message-----

From: Aaron.Heishman@hklaw.com <Aaron.Heishman@hklaw.com>
 Sent: Tuesday, August 6, 2019 3:42 PM
 To: O'Donnell, Jessica (ENRD) <JO'Donnell@enrd.usdoj.gov>
 Subject: RE: Advanced Biofuels v. EPA (DC Cir.)

Jessica,

Apologies for the delay. Attached please find an electronic copy of the sealed version of ABFA's Final Opening Brief. Let me know if you need anything else.

Thanks,

Aaron Heishman | Holland & Knight
 Associate
 Holland & Knight LLP
 800 17th Street N.W., Suite 1100 | Washington District of Columbia 20006
 Phone 202.469.5167 | Fax 202.955.5564
 aaron.heishman@hklaw.com | www.hklaw.com

-----Original Message-----

From: O'Donnell, Jessica (ENRD) <Jessica.O'Donnell@usdoj.gov>
 Sent: Monday, August 05, 2019 5:12 PM
 To: Heishman, Aaron S (WAS - X75167) <Aaron.Heishman@hklaw.com>
 Subject: RE: Advanced Biofuels v. EPA (DC Cir.)

[External email]

Sure, no problem.

Jessica O'Donnell
 Assistant Section Chief
 Environmental Defense Section
 202.305.0851

-----Original Message-----

From: Aaron.Heishman@hklaw.com <Aaron.Heishman@hklaw.com>
 Sent: Monday, August 5, 2019 5:07 PM
 To: O'Donnell, Jessica (ENRD) <JO'Donnell@enrd.usdoj.gov>
 Subject: Re: Advanced Biofuels v. EPA (DC Cir.)

Hi Jessica, I'm out of the office today. Is it OK if I send it to you tomorrow morning?

Sent from my iPhone

On Aug 5, 2019, at 4:39 PM, O'Donnell, Jessica (ENRD)
 <Jessica.O'Donnell@usdoj.govmailto:Jessica.O'Donnell@usdoj.gov>> wrote:

[External email]

Hi Aaron -

I hope you are enjoying your summer. I don't think I received a copy of the sealed version of ABFA's Final Opening brief. Would you please send me a copy? An electronic copy is all I need.

Thanks,
Jessica

Jessica O'Donnell
Assistant Section Chief
Environmental Defense Section
202.305.0851

NOTE: This e-mail is from a law firm, Holland & Knight LLP ("H&K"), and is intended solely for the use of the individual(s) to whom it is addressed. If you believe you received this e-mail in error, please notify the sender immediately, delete the e-mail from your computer and do not copy or disclose it to anyone else. If you are not an existing client of H&K, do not construe anything in this e-mail to make you a client unless it contains a specific statement to that effect and do not disclose anything to H&K in reply that you expect it to hold in confidence. If you properly received this e-mail as a client, co-counsel or retained expert of H&K, you should maintain its contents in confidence in order to preserve the attorney-client or work product privilege that may be available to protect confidentiality.

Appointment

From: Stahle, Susan [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=B25318C]
Sent: 10/21/2019 1:21:16 PM
To: Schwab, Justin [schwab.justin@epa.gov]

Subject: FW: Moot court: Advanced Biofuels Ass'n v. EPA (DC Cir)

Attachments: ENV_DEFENSE-#879685-v1-advanced_biofuels_28(j)_letter_citing_Aug_9_decision.PDF; ENV_DEFENSE-#872080-v1-DN_1796068_APPELLEE_FINAL_BRIEF__1796068__filed_by_EPA_and_Andrew_Wheeler__Service_Date__07_08_2019__Length_1115__(O_D.PDF; ENV_DEFENSE-#871340-v1-DN_1794504_INTERVENOR_FOR_APPELLEE_FINAL_BRIEF__1794504__filed_by_HollyFrontier_Refining_&_Marketing_LLC__Service_Date__06_25_2019__Length_1115__(O_D.PDF; ENV_DEFENSE-#871338-v1-DN_1794498_APPELLANT_FINAL_REPLY_BRIEF__1794498__filed_by_Advanced_Biofuels_Association__Service_Date__06_25_2019__Length_1115__(O_D.PDF; ENV_DEFENSE-#871185-v1-DN_1794208_RESPONSE__1794208__to_letter_Rule_28j_authorities__1794009-2__letter__1794009-2__filed_by_Advanced_Biofuels_Association__Service_Date__06_25_2019__Length_1115__(O_D.PDF; ENV_DEFENSE-#871142-v1-DN_1794009_LETTER__1794009__pursuant_to_FRAP_28j_advising_of_additional_authorities_filed_by_EPA_and_Andrew_Wheeler__Service_Date__06_25_2019__Length_1115__(O_D.PDF; ABFA Final Opening Brief 6-25-2019 Under Seal Version.pdf

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Cc: Dubey, Susmita; Nelson, Karen; Michaels, Lauren; Hengst, Benjamin

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For anyone wanting to participate by phone, please use this number:

Ex. 6 Personal Privacy (PP)

Thanks,
Jessica

Message

From: Weihrauch, John [weihrauch.john@epa.gov]
Sent: 8/20/2019 12:59:11 PM
To: Kim, Jung [Kim.Jung@epa.gov]; Weihrauch, John [Weihrauch.John@epa.gov]
Subject: Conversation with Kim, Jung

Weihrauch, John 8:56 AM:

Hi Jung, quick question

Weihrauch, John 8:56 AM:

On the SRE table you sent

Weihrauch, John 8:57 AM:

Did the one company that requested CWC credits also have regular RINs unretired?

Kim, Jung 8:57 AM:

yes, they already unretired the rins and now they are asking for cwc refund

Weihrauch, John 8:57 AM:

OK, thanks

Weihrauch, John 8:58 AM:

Just needed to confirm that